

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

iRACING.COM MOTORSPORT SIMULATIONS LLC,)	
a Delaware Limited Liability Company, Plaintiff)	
)	
V.)	Civil Action No.
)	05-11639 NG
TIM ROBINSON, individually and d/b/a)	
www.ow-racing.com and www.torn8oalley.com ,)	
and www.first-racing-sucks.com)	
)	
Defendant)	

AFFIDAVIT OF TIM ROBINSON
IN OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I, Tim Robinson, the named defendant in this action, upon oath depose and say as follows:

1. Attached hereto as **Exhibit 1** are copies of pages from my deposition of November 15, 2005. I have cited to pages and lines of my deposition throughout the rest of my Affidavit, to indicate that plaintiff was aware of the facts that I am setting forth herein.

The Game

2. I purchased the "NASCAR Racing 2003 Season" ("NASCAR2003") at a retail store in Texas. 155:2-5 I purchased it in early 2003, shortly after it first became available. Attached hereto as **Exhibit 2** are copies of the front, back, top, bottom and two side panels of the retail box.

3. There is nothing on any panels of the retail box indicating that the game is subject to a

EULA. The disclosures in small print appearing on the rear of the box relate to disclosing ownership of various trademarks.

4. As the retail box indicates, the NASCAR2003 game does, in fact, represent actual cars, races, drivers and tracks. 172:5-7. The fact that the NASCAR2003 game does represent actual cars, races, drivers, and tracks, and that it is able to simulate actual racing conditions of NASCAR cars on actual NASCAR tracks is part of what makes the game so popular. In my view, and that of many other people, there is little “fantasy” about it. “Fantasy” would be a generic car racing on a generic track in a made up "series" There are other games where every thing is made up, such as the sports cars that come with rFactor. 171:18-22.

Other Available Files

5. The NASCAR2003 game came with just NASCAR Winston Cup Series. Several different series became available over the internet for the NASCAR2003 game before I posted the Open Wheel Sprint Car (“OWSC”) Series.

6. Project Wildfire was a group that modified NASCAR2003 to create an “IROC Series.” 26:1-10. The group comprising Project Wildfire included some of the same individuals who currently make up iRacing.com.

7. Some of the other series that were available before the Open Wheel Sprint Cars (“OWSC”) were the Craftsman Truck Series, NASCAR Grand National Busch Series, the Project Wildfire (“PWF”) Trans-Am Series, The Pits Touring Car Championship (“TPTCC”) Series, and the Open Wheel Racing Series that I was involved in and that was different from the OWSC Series. 26:14-28:3. Also, the GTP Mod Series. 66:9-13.

8. One does not need to be an expert to run cars in NASCAR2003 that have different physics. 174:11-15; 175:4-12. If one downloads one of these different series, such as the Craftsman Truck Series or the Busch Series, that modifies the physics so that those types of cars then can run in the game. 174:11-15. The GTP Mod Series runs NASCAR2003 with modified executables. 66:9-13.

9. Other people have created different tracks. There are literally hundreds of different tracks available. They are known as “aftermarket tracks.” 16:25-17:10. In order for anybody to create a track that would work with NASCAR2003, one would necessarily have to analyze the track files that came with NASCAR2003, to make them compatible. [18:1-21]

The Early Open Wheel Racing File

10. Working with a number of other people, we created an add-on for the NASCAR2003 retail game, that started the whole Open Wheel craze. We put Open Wheel cars into the game. To do this, new cars were created from scratch using 3D modeling tools, we modified certain parameters of specific track initialization files, and included sound files more representative of Open Wheel style cars. The Open Wheel Racing Series does not use a modified NASCAR2003 executable. 66:21-24.

11. The result was not ideal, because we could not achieve the true Open Wheel experience. This early effort is still available on the internet today.

The “Wilshe” File

12. In September 2004, I received a file from Don “Wilshe” that came closer to

emulating the Open Wheel Sprint Car experience (“Wilshe file”). The Wilshe file did this by modifying the NASCAR2003 executable.

13. The Wilshe file was posted on www.torn80alley.com and on www.ow-racing.com from approximately September 2004 to early March 2005. 164:17-22.

14. I did not use Ultra Edit in connection with the Wilshe file 164:17-22. The Wilshe file came with instructions. (107:13) I did not test it (107:13). I just followed the instructions that came with it. (107:13-14). The instructions said, “put it in this folder and double click on it.” (107:16-17). I had no input in how the Sprint Car physics were supposed to work. (110:10-19). No one explained to me how those variables were obtained. (110:20-22). I received from Don “Wilshe” a small application by which I double-clicked on, and it did something to the NASCAR2003 executable. (111:2-4). What it modified, the values it used or anything else, I have no idea. (111:6-7) All I know is the end result was a Sprint car executable that acted and behaved like a Sprint car would or should or could, (111:7-9). This was basically a new series that was as a result of Don Wilshe’s application. (111:14-16).

15. The “Wilshe” file left in tact the SecuROM™ protection that requires a NASCAR2003 CD be present to run the game. I was not involved in creating the Wilshe file; I just hosted the file. 100:5-20. When one ran the Wilshe file, presumably it made some changes inside the NASCAR2003.exe executable to allow one to run Sprint cars. 102:14-24. I do not know how it did this. 102:23-24. It was a self-installing executable that has Sprint car models, paint jobs, some other minor artwork changes, and whatever was necessary to run the Sprint car mod. 105:1-5. It would operate the NASCAR2003 that the user already owned, to give them a different image that they’re racing with different physics — different from the retail version.

105:13-23.

The www.torn80alley.com Web Site

16. I did not start the web site called “www.torn80alley.com.” [p. 5] The www.torn80alley web site was started by David Kesterson, of Atlanta, GA. 48:4-17. I was a member of www.torn80alley. After I had been a member for about two years Kesterson offered the web site to me for \$1.00, and I took control of it in January 2005. 48:18-50:10. This site serves as a host to let people hook up together to compete in races. 36:4-22. I took it over, because I did not want to see the site go away. 52:8-13. The Wilshe file application was posted on the www.torn80alley.com web site in the Fall of 2004, before I acquired that web site. The www.torn80alley.com site did not host Open Wheel races using a modified NASCAR2003 executable. 68:23-69:3. After the Wilshe file Open Wheel sprint car mod package was released in September 2004, it was used for only one race on www.torn80alley.com. 130:9-25.

December 2004 Beta Testing

17. I had to apply to be a Beta tester. [p. 4]

18. I never had a pirated version of NASCAR2003. I already had owned a copy of NASCAR2003 for over a year when I applied to be a Beta tester. [p. 4]. Ownership of a copy of NASCAR2003 was a requirement to be a Beta tester.

19. On December 21, 2004, I received an email accepting me as a Beta tester, to test an unreleased beta version of NASCAR2003. The email accepting me contains the following statement:

"You must own a copy of NASCAR Racing 2003 product from Papyrus Racing Games. At this very early stage of testing we are using very low horsepower cars for testing the beginning levels of FIRST. Therefore your experience level can be from novice to expert - it does not matter. What matters is participation and feedback."

Attached as **Exhibit 3** is a true copy of the December 21, 2004 email from First.

On 12/29/2004 I received an email containing links to necessary files that would be used as part of this Beta. In the email itself, it states the following:

"We need you to also understand this. We are testing ideas and formulas. We are not testing this physics engine or car modeling. This mod you are getting is NOT our future product. This mod was created for us to have some fun that relates somewhat to what our future goals are. We are using N2003 to do this test but understand our future product will be a whole new sim. Not the mod you will be driving now."

Attached as **Exhibit 4** is a true copy of the December 29, 2004 email.

20. I was not required to agree to the terms of any EULA when I first ran the Beta version of NASCAR2003 given to me by First. All that had to be done once I received the file was copy the file to my existing NASCAR2003 folder. The EULA was never presented to me during this Beta Testing. [p. 4]

21. The files that I received as part of this Beta testing were an altered version of the original NASCAR2003 game. Apart from running these files as part of the Beta testing, I never made any use of them whatsoever. I never made any modifications whatsoever to the files that I received as part of the Beta test. [pp. 4-5]. I never disclosed to anyone any information about the content of the Beta version.

22. I ceased participating in the Beta test after about a month, in the last part of January 2005. 54:24-55:1.

The ovr2k5 File

23. I never had anything that I called “OW Racing 2004.” I did not use the “Wilshe” file to modify the NR2003.exe code in order to create any “OW-Racing 2004 Mod.” or to create the ovr2k5 file.

24. As noted above, I have my own copy of NASCAR2003 that I bought at a retail store in Texas. 155:2-5. I had it when I was doing development work on Ovr2k5. 154:25-155:5. I did not isolate any lines of pirated code. I did not make any lines of pirated code available on torn80alley.com and ow-racing.com. [p. 7].

25. I started working on the ovr2k5 file in November 2004. 189:16-18. I did so as a follow-on to the original .Open Wheel mod that we did, in order to create a more realistic version of an .Open Wheel car. 187:13-188:7. I did it because I like racing and there was not a good .Open Wheel simulation available elsewhere. 188:11-20. I was simply trying to give something back to the Racing Community for which I had downloaded Craftsman Truck Series, Busch Series, the TPTCC Series, car paints, tracks, everything else. 198:8-14.

26. My work was completely non-commercial. [p. 16]. I never charged for it; I never accepted money for it; I never used advertising to create revenue; there was never any advertising associated with my sites. My work was simply given away.

27. When I started this work, the NASCAR2003 game was off the market; it was no longer being sold. 189:5-15.

28. Ultra Edit – I used the tool Ultra Edit in connection with my work on ovr2k5. 164:14-16. The “Ultra Edit” tool that I used in creating the ovr2k5 file is a “hex editor” that

simply shows a series of hex numbers. A hex editor lets one look at a file and read the hexadecimal digits in that file. I used its hex editor function on the NASCAR2003 executable file. 164:23-25. That is the only tool that I used on the NASCAR2003 executable. 166:2-5.

29. The Ultra Edit tool does not enable one to view the Source Code. I never viewed any Source Code that made up the NASCAR2003 software. I never decompiled the NASCAR2003 code. 225:13-16. I did not look at "Object Code." Rather, the hex editor that I used only shows hexadecimal values that relate to the code.

30. Rather than changing the track *.ini files to add more grip to the cars, as was the case with the early Open Wheel Racing file, the owr2k5 file modified the executable to achieve the physics effect that we were looking for that would best simulate an Open Wheel Race Car. 75:19-76-7.

31. To put together the owr2k5 file, I had to figure out all of the variables that were needed for .Open Wheel cars, such as spring rates, shock rates, weight distribution, maximum weight allowed, gas, fuel cell size, fuel cell location, front and rear wing adjustments. 216:16-217:2. The Open Wheel cars are totally different in shape and in operation from NASCAR cars. There is nothing in the NASCAR2003 program that was of any help to me in figuring out what variables I had to use for .Open Wheel cars; it was just trial and error. Then I had to figure out where to substitute each of these values in the NASCAR2003.exe file. 217:3-25.

32. We also added realistic Open Wheel sounds because there are different, unique sounds in the game that simulate the car idling on pit row, taking off from pit row, changing gears, the sound it makes at 10,000 rpms down the backstretch at Texas. 218:16-219:1. The sounds were not part of the executable; they were WAV files stored in a separate sound folder.

219:2-7; 220:7-10. The NASCAR2003 executable points to different sound files at different times. 250:11-12. I replaced the sound files, and gave them the same names as the original sound files, so that the NASCAR2003 executable would point to the new sounds. 250:11-15.

33. The ovr2k5 also added in approximately 20 new cars. 221:13-18. When installed, cars are stored in files separate from the executable.

34. It was no simple task, using a hex editor, to test and to create all of the values that were needed for the totally different Open Wheel cars. The items mentioned in the Court's earlier Memorandum were only a few of the things necessary to be created for the characteristics of the new Open Wheel cars. This is apart from the separate 3D modeling that was involved to create the Open Wheel car that replaced the NASCAR style car. [p. 6]

35. Other Tools – I used a 3DS Max tool to do 3-D modeling for 3-D parts; but there is nothing associated with 3DS Max that applied to the NASCAR executable file. 166:15-20. I used Winmip2 to export a car file out of the NR2003 game so that I could paint it or do any number of other things to it. 167:4-7.

36. The ovr2k5 file is not identical to NR2003.exe. "Identical" suggests that they would be the same size, which they were not. I never said that I only "changed less than a tenth of a percent" as appears in the earlier Court Memorandum at page. 16. I believe that was Mr. DeLong's assertion. The NR2003.exe file size is 5297kb; the ovr2k5 file was 3720kb, which is about 70% the size of the NR2003.exe file. 37. Therefore I would dispute the fact that 99.9% of the original code could be in my ovr2k5 file, which is only 70% as large as the NR2003.exe file.

38. I respectfully submit that it is grossly unfair to compare my work with an author who

simply changes the place name for the setting of a story, as appears in the Court's earlier Memorandum at page. 17. If I had not created an Open Wheel car, with all of the changes in the car's physics and handling properties, and all of the other transformative work, and simply "renamed" the cars or "renamed" tracks, then the comparison might be appropriate.

39. Simulating the physics of an Open Wheel Car is only a small part of my transformative work. [p. 17]. There was 3D modeling that was necessary to create an Open Wheel Car; there was the creation of sounds for an Open Wheel Car; and there was the painting of skins to be applied to the cars, etc.

40. My ovr2k5 file does "transform" the original NASCAR2003 work so as to produce "new information, new aesthetics, new insights and understandings." [p. 16]. That is exactly what was done. When you take a NASCAR related game, and from scratch 3D model and create an Open Wheel style car, and then modify the NASCAR parameters and specs so that an Open Wheel experience can be achieved, you have "transformed" the game into something completely different.

Removal of the Wilshe File

41. Mr. Meyers' March 4, 2005 email did not specify what on the web sites he believed infringed First's copyrights. [p. 8] The email stated:

"Mr. Robinson,

We are asking for your cooperation in removing any and all content that you have put up on the web that infringes on FIRST's copyrights, which include all rights to the source and object code of the NASCAR Racing 2003 Season PC game published by Vivendi Universal Games **not expressly granted to the end user in the End User License Agreement included with the retail version of said game.** The rights **not** granted

include, without limitation, the rights to modify or create derivative works. It has come to our attention that you have willfully posted material which violates those rights and respectfully ask you to stop. Please remove all said content by 5:00 PM Eastern Daylight Time Monday, March 7, 2005, and reply to this email with confirmation that you have done so. "

I did not then, and I still do not believe that I infringed on anything.

42. When Mr. Meyer sent me this March 4, 2005 email, I took down the "Wilshe" file, by renaming the file; there was no longer any link to the file. 90:18-91:1. If somebody knew the file name and the particular address of that file, they could type it in to their browser; but not otherwise. 93:2-10; 142:2-5.

43. When I received the March 4, 2005 email from Mr. Myers, our early version of Open Wheel Racing was still available to the public. That version did not use a modified executable. 73:2-11. That version simply modified track *.ini files, to adjust the grip to the tracks so that Open Wheel Models could be run, instead of the PTA set of model cars that had been released by Project Wildfire. 74:17-75:14. The result was an adjunct to the existing retail NASCAR2003 product. 75:15-18. I did not take that version down, and plaintiff never followed up with any complaint about that version.

The ovr2k5 File was Never Purposefully Made Available to the Public

44. The ovr2k5 file was made available to select people for practice sessions, in January 2005.131:18-132:13. Certain people were given access to the file; other than that, one would have to know the right IP address to find the file. 133:10-22. I am not aware of anybody outside of the testers using the ovr2k5 file to race at any time. 137:22-138:2.

45. The ovr2k5 file did become available on the www.OW-Racing.com web site I

owned, but only by mistake, and only for a short period of time. It was never supposed to have become available to the public. 72:18-24.

46. When I received Mr. Myers' March 4, 2005 email, the ovr2k5 file was still under development. 73:9-115. Two other people were participating with me. 77:2. One of them did primarily 3-D modeling which is incredibly more difficult than some of the other work involved. 122:4-15.

47. We were still creating models for these particular cars, painting the cars and creating different artwork. 74:1-9. The file was available to us on the www.torn80alley.com web site, but it was not on the front page, and there was no link making it available to anybody else. 78:4-14.

48. Some time at the end of July or early August 2005, while I was on vacation, it got placed into the front page of the www.OW-Racing.com web site as a link, by mistake. 78:4-14; 87:3-9;118:5-17. I did not do it.

49. One would have to log into the site and have access given by me in order to perform that function. 79:4-9. Access to the web site would have to take place on the server that VIRTBIZ owns. 81:13-17. I do not know who made the links active. 97:15-16. When it was brought to my attention, I took the link down.

The ovr2k5 File was not available on the www.torn80alley.com web site

50. The ow2k5 file was never distributed on the www.torn80alley.com web site. 85:17-20. There was never a time when anybody could download the ow2k5 file from www.torn80alley.com. 86:9-17. The link to the file was not on www.torn80alley.com. 86:24-

87-1.

The ovr2k5 File was not available on the www.first-racing-sucks.com web site

51. I set up the web site www.first-racing-sucks.com at a time when First Racing had caused a level of dissatisfaction in the Sim Racing community. 56:15-23. First Racing had shut down a group known as “RedLine Developments” for a mod that they were creating known as the GTP mod. 57:3-25. First Racing had filed a lawsuit against Tim McArthur. 58:15-59:22.

52. First Racing was in the process of stopping people from creating modifications; I was annoyed with the process they were using, more than anything else. 61:17-18; 62:10-17. First Racing had posted a message on their web site accusing the Sim Racing Community as being hackers and thieves, and I took offense, personally. 64:14-65:24.

53. The file that existed at www.first-racing-sucks.com was not the ovr2k5 modified file. [p. 7]. It was a ZIP file that was made to appear as though it was the modified file. In fact, however, it was only a compilation of sounds that were provided by what was then known as “Project Wildfire”, and it was the sounds to one aspect of their Trans-Am mod. 14:22-24; 84:3-10.

54. I knew First Racing was looking for this kind of information, and so I did that to see what reaction I would get from First Racing. 85:2-8. I made it look like the real ovr2k5 file. 138:17-139:8. The ovr2k5 file exists within a folder in a directory on the web server. 141:1-24. But if you are visiting the www.first-racing-sucks.com site, you cannot get to it. 141:25-142:1. And that ovr2k5 file does not contain any modified executable of NASCAR2003.exe. 142:14-15.

Availability of NO-CD Patches

55. I did not invent NO-CD patches. I did not invent the NO-CD patch for NASCAR2003. [p. 11].

56. "NO-CD" patches are something that have been widely available and used for any number of games, including previous versions of the Papyrus NASCAR series of games, which neither Sierra nor Papyrus ever tried to stop people from distributing or using. It was even made available on the Project Wildfire website, which was comprised of the some of the same individuals who currently make up iRacing.com. Again, anybody who wished to do so could have used the NO-CD patch with NASCAR2003 long before I made a NO-CD patch available. But in either event, they would need to have NASCAR2003 installed on their computer.

57. The CD key that I described in my deposition and that is referred to in the Court's earlier Memorandum at page 22 is only used as a mechanism for playing online in public servers. If you don't have a valid CD key, you cannot play in those public servers. A CD key is a specific software-based key for a certain program or a computer game. It is used to identify that the copy of the program/game is original. Activation is sometimes done offline simply by entering the key, or with software like Windows XP online activation is required to prevent multiple people using the same key. Computer games use CD keys to verify that the game has not been illegally copied; for example, one could not play Diablo II or Starcraft online without an original/unique CD key. Another example is Battlefield 2 or Battlefield 2142 will not allow you to play online when two identical CD keys are online at the same time.

58. The NO-CD patches were already widely available for the NASCAR2003 game before I began to construct a NO-CD file for the Wilshe file..

59. NASCAR2003 NO-CD Patches are still widely available on the internet. Attached as **Exhibit 5** is a partial listing of web sites where NASCAR2003 NO-CD patches could be found when I looked some months back. I did not create any of these.

Alternatives to NO-CD Files

60. I do not need to use a NO-CD file on my computer, because I run another utility, “BlindWrite,” that makes a copy of the image that can run from the hard drive. 157:23-158:22.

61. Nobody else could run NASCAR2003 just using the image created by BlindWrite, because they haven’t installed it with the proper CD key; the CD key is in the Registry of Windows and it is encrypted. 161:1-18.

62. “BlindWrite” is a commonly available piece of software; I purchased it off the web. 158:8-21.

63. BlindWrite’s web site is www.blindwrite.com.

64. As far as I know, both the NO-CD files and BlindWrite require use of a CD key. 185:15-24.

65. There are many other tools available, other than BlindWrite, that will image an application so you can run it from a hard drive. 159:4-9.

My NO-CD Patch

66. I found on the internet an existing, widely used, version of a NASCAR2003 “NO-CD patch.”

67. The NASCAR2003 NO-CD patch that I found is not a copy of the NASCAR2003

executable. The NO-CD patch simply lets the user access their own copy of NASCAR2003 that is stored on their own computer without having to have the NASCAR2003 CD inserted into their disk drive. The NO-CD patch will not work unless one already has NASCAR2003 installed on their computer.

68. The NO-CD patch that I prepared simply let people access the Wilshe file without having a CD in their CD-Rom.

69. When I removed the Wilshe file in March 2005, I removed the NO-CD file as well.

70. The No-CD patch does not circumvent SecuROM. [p. 22]. SecuROM is a technology designed to prevent persons from making duplicate copies of the disks on home media duplication devices, or professional duplicators. I never created any code to shut down SecurROM.

71.. No-CD files have legal uses, such as creating backups of legally owned software (a user right by law in many countries) or avoiding the inconvenience of placing a CD-ROM in the drive every time the software already loaded into the computer is being used. Avoiding the inconvenience, and the wear on the CD of placing a CD-ROM in the drive every time the software is being used is the primary use here.

72. A NO-CD patch does not violate the policy of the DMCA in the present circumstances. There are exemptions allowed under the DMCA as written. Specifically, in addition to the safe harbors and exemptions that the statute explicitly provides, 17 U.S.C. 1201(a)(1) requires that the Librarian of Congress issue exemptions from the prohibition against circumvention of access-control technology. Exemptions are granted when it is shown that access-control technology has had a substantial adverse effect on the ability of people to make

non-infringing uses of copyrighted works.

One of the exemptions approved is written as follows: "Computer programs and video games distributed in formats that have become obsolete and that require the original media or hardware as a condition of access, when circumvention is accomplished for the purpose of preservation or archival reproduction of published digital works by a library or archive. A format shall be considered obsolete if the machine or system necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace." (A renewed exemption, first approved in 2000.) " A copy of the 2000 text is attached as **Exhibit 6** .

73. Taking that statement alone, since NR2003 was (and continues to be) no longer manufactured and is not readily available in the marketplace, the use of a NO-CD tool to preserve a user's investment is perfectly acceptable. Otherwise, what would the purpose of the exemption be? The exemption was written for the specific purpose of allowing people with outdated games to be able to use them for as long they wish without worry about the CD wearing out from constant use.

NO-CD File for the ovr2k5 File

74. I never created a NO-CD patch for the ovr2k5.exe file; we never got that far.
257:24-258:11. [p. 7]

75. The NO-CD file that I created for the "Wilshe" file would not work with the ovr2k5 file.

76. In order for anyone to run the ovr2k5 file, they would have had to put their

NASCAR2003 disk into their CD-Rom player.

77. The things that “went wrong” when plaintiff’s attorney attempted to run NASCAR2003 using the NO-CD at my deposition was that it would not work with the ovr2k5 file. He needed to have NASCAR2003 installed on his computer, and he needed to have the NASCAR2003 CD inserted into his CD-ROM for the ovr2k5 file to work. [p. 8].

No Market for NASCAR2003


78. When I started work on ovr2k5 in the Fall of 2004, the NASCAR2003 game was off the market; it was no longer being sold. 189:5-15. It had been off the market for over a year.

79. There could be no potential market for the game, because by plaintiff’s own admission in connection with its Beta testing in December 2004, they were not using any of the game for their new product. [p. 19]. **Exhibit 4.** Also by their own admission, highlighted by their recent articles, none of their development work is targeted towards the retail sim racing community. It is targeted to professional race teams. John Henry, the financial backer behind plaintiff reportedly has spent \$60M dollars buying his way into Roush Racing, and reportedly also was in the running to buy the New Hampshire race track for upwards of \$300M dollars. He did not stand to lose anything by my transformative work on NASCAR2003.

80. These people took my money to sell me a game without telling me what I could not do with it. Then they sprung a EULA agreement on me with terms that they want to enforce against me. But plaintiff says that they don’t have to abide by anything in the EULA that they do not now like, such as their choice of forum and law, and their agreement that no one party

could change any of the terms. I do not know how I can be bound by an agreement that plaintiff drafted, and yet plaintiff is not bound by it.

The foregoing affidavit is made and given under the pains and penalties of perjury this
28th day of January 2008.



Tim Robinson

EXHIBIT 1A

Deposition Pages:

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1 Q. (BY MR. SCHWARTZ) So now, just by reference to
2 the file name there on the screenshot -- do you see that,
3 owr2k5?

4 A. Yes.

5 Q. Are you familiar with that file?

6 A. Yes.

7 Q. Can you tell us what that file is?

8 A. That file is a compilation of what was known as
9 PWF sounds that were compiled and put together in that
10 format with that file name.

11 Q. And that's the only thing that's in that file, is
12 that your testimony, PWF sounds?

13 A. There may be other associated files that are
14 related to the sounds, but that's what's in the file.

15 Q. Now, when -- let me -- let me -- does that --
16 well, one more question on this one. Does that file that
17 we're talking about, the owr2k5 file, does that have any
18 relationship to NASCAR 2003?

19 A. Yes.

20 Q. And what is that relationship, to your
21 understanding?

22 A. It is a compilation of sounds that were provided
23 by what was then known as Project Wildfire, and it was the
24 sounds to one aspect of their Trans-Am mod, as I recall.

25 Q. Now, do those sounds, when they are -- when that

1 file is run, does that modify NASCAR 2003?

2 A. Define modify.

3 Q. Well, does it in any way change the retail version
4 of NASCAR 2003?

5 A. Yes.

6 Q. Okay. So let's now go back to some of my
7 questions about NASCAR 2003 and what might have been
8 deleted from your computer. Were there anything else
9 that -- beyond what you've already testified to that you
10 deleted that relates to a modification of NASCAR 2003 as
11 opposed to just the retail version?

12 A. Yes.

13 Q. Okay. What else did you delete that might have
14 been related to a modification to NASCAR 2003?

15 A. I deleted a IROC Series installation.

16 Q. Okay. Anything else?

17 A. No.

18 Q. Now, when you say you deleted tracks, what -- what
19 does that mean?

20 A. Exactly what I said. I deleted tracks that I no
21 longer use.

22 Q. So by way of context, NASCAR 2003 is an auto
23 racing simulation program, correct?

24 A. Yes.

25 Q. And when you say you deleted tracks, that means

1 you deleted data that the program uses to reflect tracks;
2 is that correct?

3 A. Say that again.

4 MR. SCHWARTZ: Can you read it back for me,
5 please?

6 (Requested Portion was Read.)

7 A. As a part of deleting that -- a particular track,
8 yes.

9 Q. (BY MR. SCHWARTZ) Okay. Is there -- when you say
10 "as a part of," does that mean there's additional things
11 you understood that was deleted when you deleted that track
12 other than the data?

13 A. No. There's other components associated with a
14 track that doesn't necessarily reflect track data --

15 Q. Uh-huh.

16 A. -- but are included in the same folder as a track.

17 Q. I see.

18 A. That data was also deleted.

19 Q. Okay. And the tracks that you deleted, to your
20 recollection, were those tracks that were originally
21 provided with the NASCAR 2003 program? When I say
22 "provided," I mean in the retail package.

23 A. No. I haven't deleted any of the original retail
24 versions of the tracks.

25 Q. So the tracks that you deleted were actually

1 additional data and other information that would run with
2 NASCAR 2003 to depict a different track than what was in --

3 A. They're known as aftermarket tracks.

4 Q. Okay.

5 A. That's what -- there's literally hundreds of them
6 available.

7 Q. Okay.

8 A. I probably have downloaded hundreds of them to try
9 them out or whatever. And if I no longer use a track, then
10 I delete it.

11 Q. Okay. And to your understanding, how does NASCAR
12 2003, the retail version, operate with tracks that you
13 download -- literally hundreds of tracks that you download?

14 A. Can you -- can you say that again?

15 Q. Well, let me -- I'll -- I'll break it down. And
16 feel free any time you don't understand a question that I'm
17 putting to you, ask me to clarify it.

18 A. Okay.

19 Q. It's much better that we get it on the record
20 clearly than some mistake.

21 So as I understood your previous testimony,
22 you said that you download tracks that will operate with
23 NASCAR 2003 even though they weren't part of the original
24 NASCAR 2003 retail product, correct?

25 A. That's correct.

1 Q. And my question to you is if you understand how to
2 get the NASCAR 2003 retail product to work with these
3 tracks that are not part of the re- -- retail product.

4 A. Do I understand how to make those aftermarket
5 tracks work with the NASCAR 2003 game?

6 Q. Yes.

7 A. Yes.

8 Q. And how do you do that?

9 A. You load the track into the tracks folder.

10 Q. And then the game automatically allows --
11 incorporates the track or do you have to do other things?

12 A. Generally speaking, it -- it runs straight away.

13 Q. Okay.

14 A. I mean, there -- you may have to add a specific
15 setup into that particular track folder in order for it to
16 run correctly, but I would say in 95 to 99 percent of -- of
17 the tracks that you've downloaded, you simply unzip them
18 and put them into the tracks folder and they run.

19 Q. Okay. How do you know when you're down loading a
20 track that it will run with NASCAR 2003?

21 A. You don't.

22 Q. Where do you find the tracks that you download
23 that you hope will run with 2000 -- NASCAR 2003?

24 A. Any number of places on the web that are
25 associated with this particular software.

1 Q. Okay. And then I think you also mentioned to my
2 question about modifications to NASCAR 2003 that you
3 deleted an IROC Series installation; is that right?

4 A. Yes. Well, I deleted the IROC Series folder.

5 Q. Okay. What is the IROC Series?

6 A. It was a modification done by a group known as
7 Project Wildfire. I don't recall exactly when it was
8 released, but it's -- it's not something that I race in
9 that kind of series very often. So as a measure to
10 preserve some space on my hard drive, I simply deleted it.

11 Q. And did that occur before or after the
12 commencement of this case?

13 A. Before.

14 Q. Now, I think you used the term "series" a moment
15 ago. What do you mean by series?

16 A. There are what's called different series available
17 for the NASCAR game. Initially, the game came with just
18 NASCAR Winston Cup Series. And subsequent to the release
19 of the -- the retail game in 2003, other series have become
20 available.

21 Q. What other series are you aware of?

22 A. Craftsman Truck Series, NASCAR Grand National
23 Busch Series, the PWF IROC Series, the PWF Trans-Am Series,
24 the TPTCC Series, the -- the open wheel -- I can't remember
25 what we called it -- the open wheel -- open race -- open --

1 conducts a race, what does that mean? What is Torn8oAlley
2 actually doing there?

3 A. Hosting a race.

4 Q. Okay. And when it -- I don't -- I don't mean to
5 be dense here, but when you host a race, does -- what --
6 what is Torn8oAlley doing? Is it just a bulletin board to
7 some people, let's all hook up together at a certain time
8 and run a race, or does it do more than that?

9 A. That's all it does.

10 Q. And then it posts the results?

11 A. Right.

12 Q. And -- and this may get into a little bit about
13 the way the base NASCAR 2003 works, but does -- how do
14 the -- let's say you've got ten members who want to run a
15 truck race --

16 A. Uh-huh.

17 Q. -- how do they connect to each other?

18 A. Over the Internet.

19 Q. Through a peer-to-peer type of networking?

20 A. There's a dedicated server that they all connect
21 to.

22 Q. Okay. And who maintains that dedicated server for
23 races that torn8oalley.com runs?

24 A. I do.

25 Q. Okay. And is that dedicated server your home

1 computer?

2 A. No, it is not.

3 Q. Is it -- well, where -- where is it?

4 A. It's located in a data center in Plano, Texas.

5 Q. Is that the -- is it at VIRTBIZ?

6 A. No.

7 Q. Okay. Is this something you own or --

8 A. Yes.

9 Q. Okay. So you own this server?

10 A. Yes.

11 Q. And what -- what is -- is there a name for that
12 data center? Is it a hosting site or hosting service of
13 some nature?

14 A. It's just a private data center.

15 Q. Okay. Does it have a business name that you're
16 aware of? You send money to it so it will keep your
17 computer data right?

18 A. That particular server, I don't pay for. I don't
19 pay any hosting or any type of fees for, so no.

20 Q. Is it -- it's connected to the Internet, right?

21 A. Yes.

22 Q. But there's no charge for it being connected to
23 the Internet?

24 A. No.

25 Q. Is it at your home?

1 company.

2 Q. Okay.

3 A. GoDaddy is a registrar of domain names.

4 Q. Did you use GoDaddy to register Torn8oAlley?

5 A. Yes.

6 Q. Okay. But as to that one, you did not choose the
7 option that called for privacy; is that right?

8 A. That domain was transferred to me by the previous
9 owner.

10 Q. Who was that?

11 A. The previous owner?

12 Q. Uh-huh.

13 A. A guy in Atlanta.

14 Q. What's his name.

15 A. David.

16 Q. Last name?

17 A. Kesterson.

18 Q. How do you -- how did -- how did it come that
19 David Kesterson transferred you torn8oalley.com?

20 A. He asked me if I wanted it.

21 Q. Asked you by e-mail or by -- over the phone or in
22 person?

23 A. Actually, I think he asked me in person.

24 Q. How do you know Mr. Kesterson?

25 A. He was the original owner of torn8oalley.com.

1 Q. Why did Mr. Kesterson want to sell you this, do
2 you know?

3 MR. RYAN: Objection.

4 A. You have to ask him.

5 Q. (BY MR. SCHWARTZ) You -- he never told you why he
6 wanted to sell it?

7 A. Not that I recall.

8 Q. Why did you want to buy it?

9 A. Because I didn't want to see the site go away. I
10 want -- you know, continued to race and support the -- the
11 members, so -- I had the wherewithal, the skills, whatnot,
12 to run a website and do those kind of things, so it was a
13 perfect fit as it were.

14 Q. Okay. Now, you mentioned -- let's go back to
15 first-racing-sucks.com. You mentioned that you registered
16 that name through GoDaddy and you used their privacy
17 option.

18 A. Yes.

19 Q. What other websites do you maintain through
20 GoDaddy?

21 A. Say that again.

22 Q. Well, I think you testified earlier that you had
23 an account with GoDaddy --

24 A. Correct.

25 Q. -- and it was quite easy for you to register

1 first-racing-sucks.com because you had this account?

2 A. Correct.

3 Q. And I thought I understood you to say you had an
4 account with them because you had other websites?

5 A. No. I said I had other domains.

6 Q. Oh, domains. I'm sorry. What other domains do
7 you have with GoDaddy?

8 A. Torn8oalley.com, torn8oalley.net, torn8oalley.us,
9 ow-racing.net.

10 Q. Any others?

11 A. Simracingalliance.com, Simracingalliance.net, I
12 believe. I'd have to look at my account. I don't recall
13 every single domain that I have.

14 Q. Okay.

15 A. As it relates to this particular case,
16 torn8oalley.com, ow-racing.com, first-racing-sucks.com,
17 torn8oalley.net and that's it.

18 Q. The Sim Racing Alliance, does that have anything
19 to do with NASCAR 2003?

20 A. No.

21 Q. Do you get a bill or some sort of statement from
22 GoDaddy that reflects all the domain names that you've
23 registered with them?

24 A. No.

25 Q. Do you pay some sort of service fee or some sort

1 of compensation to GoDaddy for registering all these names?

2 A. At the time of registration.

3 Q. They send you a confirmation that says you've
4 succeeded in registering --

5 A. Yes.

6 Q. -- such and such a name?

7 A. Yes.

8 Q. And you pay them whatever it is?

9 A. You pay them before you get the confirmation.

10 Q. Okay.

11 A. You pay them online.

12 Q. You pay with a credit card?

13 A. Yes.

14 Q. Why did you choose to electric the privacy option
15 for first-racing-sucks.com?

16 A. Because I didn't want to be bombarded with spam.

17 Q. Any other reasons?

18 A. No.

19 Q. Now, there was a time, was there not, that you
20 were a beta tester for iRacing -- or First Racing, as it
21 was known at the time?

22 A. For a very short period, yes.

23 Q. While -- can you help us, when was that that you
24 were a beta tester?

25 A. Approximately the end of December 2004 to the last

1 part of January 2005.

2 Q. And did you register first-racing-sucks.com during
3 that period?

4 A. During what period?

5 Q. The period that you were a beta tester that you've
6 just identified?

7 A. No.

8 Q. Why did you discontinue acting as a beta tester
9 for First Racing?

10 A. As I've said in an e-mail to them, between my
11 responsibilities at work, other Sim Racing sites and being
12 handed divorce papers, I didn't have the time to prepare
13 adequately for the races that were being conducted.

14 Q. And that -- that was around January 2005 you
15 communicated that?

16 A. That's correct.

17 Q. And then when did you set up
18 first-racing-sucks.com, to the best of your recollection?

19 A. As I said, I don't recall the exact date.

20 Q. What happened -- as of January 2005, why did you
21 choose the name -- strike that.

22 Why did you choose the name
23 first-racing-sucks.com to register?

24 MR. RYAN: Did that question have a date as
25 part of it, because I don't think he's given a date unless

1 I missed something.

2 MR. SCHWARTZ: It didn't have a date, but it
3 was open ended. It just asked him why he chose the name.

4 MR. RYAN: But you said why he chose it in
5 January?

6 MR. SCHWARTZ: No. It had no date in it.

7 MR. RYAN: Okay.

8 A. I actually don't recall a specific reason for --
9 for choosing that name other than it was modeled after
10 their site at the time, which was firstracing.net.

11 Q. (BY MR. SCHWARTZ) And you wanted to add the word
12 "sucks" to firstracing.net?

13 A. No. I wanted to add the word "sucks" to First
14 Racing.

15 Q. Okay. Do you recall why you wanted to add the
16 word "sucks" to First Racing at the time you registered it?

17 A. No. I don't recall the specific reason.

18 Q. Do you recall generally the reason?

19 A. I suppose that generally speaking in the Sim
20 Racing community, there was a level of dissatisfaction
21 associated with First at the time, and it seemed
22 appropriate.

23 Q. Now, would you say that that level of
24 dissatisfaction that you've just identified, was that true
25 as of January 2005 when you discontinued your efforts as a

1 beta tester for First?

2 A. No.

3 Q. What, to your recollection, caused that level of
4 dissatisfaction, if you know?

5 A. What appeared to me personally?

6 Q. Yeah.

7 A. My interpretation from visiting various websites
8 was that the general Sim Racing community was rather pissed
9 off at Dave Kaemmer and his bunch about shutting down at
10 the time a group known as RedLine Developments for a mod
11 that they were creating known as the GTP mod, which by the
12 way, is another mod that I have installed that I --

13 Q. You forgot about?

14 A. -- forgot about previously.

15 Q. So your recollection is that sometime after
16 January of 2005, you perceived that there was a
17 dissatisfaction among -- I think you said the Sim Racing
18 community; is that right?

19 A. Yes.

20 Q. With the actions of First Racing?

21 A. Correct.

22 Q. And that relates to some sort of interaction
23 between First Racing and the RedLine people?

24 A. To the best of my recollection, that's where it
25 started, yes.

1 Q. Okay. And to the best of your recollection, is
2 that what motivated you to register the name
3 first-racing-sucks.com?

4 A. I don't think so. I don't think at that point --
5 although I don't recall the exact timing of when all that
6 happened, but I don't think the RedLine Developments
7 episode, as it were, really had much influence on me
8 personally.

9 Q. Okay. So was there something else that had
10 influence on you that motivated you to register the name
11 first-racing-sucks.com?

12 A. No. I don't think there was anything specific
13 that motivated me other than just a general dissatisfaction
14 with First Racing at the time.

15 Q. Okay. Other than the situation you described with
16 RedLine, which I think you said didn't personally trouble
17 you very much, what else happened that you can recall that
18 would have raised your level of dissatisfaction to such
19 that you would have registered the name
20 first-racing-sucks.com?

21 A. I suppose the McArthur lawsuit had something to do
22 with it.

23 Q. And when you say "the McArthur lawsuit," what do
24 you mean by that?

25 A. The lawsuit that you filed against Tim McArthur.

1 Q. Okay.

2 A. You know very well what I'm talking about.

3 Q. Well, I know --

4 A. Okay.

5 Q. -- but the purpose is for the record for the
6 Court.

7 A. My apologies.

8 Q. And what did you understand -- or what did -- what
9 about that lawsuit raised your level of unhappiness with
10 First Racing to the -- such that you would register
11 first-racing-sucks.com?

12 A. That the point, I didn't care for the way the Sim
13 Racing community was being treated by First Racing, so I
14 registered the domain name.

15 Q. Okay. And when you say "being treated," what is
16 it that First Racing was doing to the Sim Racing community
17 that you didn't care for?

18 A. They were in the process of stopping people from
19 creating modifications to the NASCAR 2003 game, which had
20 gone on for almost two years -- maybe not quite two years,
21 but somewhere in that kind of neighborhood. That's pretty
22 much it.

23 Q. Are you familiar with the actions that
24 Mr. McArthur was sued for by First Racing? Do you know
25 what he did that caused them to file a lawsuit?

1 A. Only in generalities.

2 Q. Well, do you know -- do you know that the lawsuit
3 alleged that he violated First Racing's copyrights?

4 A. Yes.

5 Q. Do you know whether he did or he didn't?

6 A. I have no idea.

7 Q. Okay. If he did, would that still have annoyed
8 you that First Racing sued him?

9 MR. RYAN: Objection.

10 Q. (BY MR. SCHWARTZ) Do you understand the question?

11 A. No. Rephrase it.

12 Q. If, in fact, the allegations were true that
13 Mr. McArthur violated First Racing's copyrights --

14 MR. RYAN: Objection.

15 MR. SCHWARTZ: Well, I haven't finished my
16 question, Joe. I'm asking the witness to assume something.

17 Q. (BY MR. SCHWARTZ) If, in fact, the allegations in
18 the complaint against Tim McArthur were true and that he
19 did violate First Racing's copyrights by the application he
20 was distributing, would it still annoy you that First
21 Racing sued him?

22 MR. RYAN: Objection.

23 A. I'm still not sure I understand your question.

24 Q. (BY MR. SCHWARTZ) Well, I think one of the
25 answers you gave as to your level of dissatisfaction with

1 First Racing was that it had sued Tim McArthur, correct?

2 A. Correct.

3 Q. So my question to you is -- and you then said that
4 you didn't know whether the allegations in the complaint
5 were true or false, correct?

6 A. That's correct.

7 Q. Okay. So my question to you is: If the
8 allegations were true, would it still have annoyed you that
9 they sued Tim McArthur?

10 MR. RYAN: Objection.

11 A. Yes, it would have.

12 Q. (BY MR. SCHWARTZ) So even if -- even if there was
13 a violation of First's copyrights, you would still have
14 been annoyed that they sued the person who violated them;
15 is that right?

16 MR. RYAN: Objection.

17 A. I -- I was and still am more annoyed with the
18 process more than anything else -- the way in which
19 Steve Myers, Dave Kaemmer and anybody else associated with
20 First Racing at the time decided to carry out their mission
21 of shutting down people that were creating modifications to
22 their game -- or their alleged game at the time, because at
23 the time, there was no proof that they, in fact, even owned
24 the rights to the game as they claimed.

25 Q. (BY MR. SCHWARTZ) So is that why you were annoyed

1 is that they were trying to, in your words, shut down
2 people who were modifying NASCAR 2003 without proof that
3 iRacing -- or at that time, First Racing owned the rights
4 to the code?

5 A. No.

6 Q. Okay.

7 A. That's not what I said.

8 Q. I thought -- I thought that's what you said. I
9 apologize then.

10 So what is it about the way that Steve Myers
11 and the rest of the people at First Racing at the time were
12 attempting to shut down people who were modifying NASCAR
13 2003? What is it about that that troubled you?

14 A. I suppose it is just the method by which they
15 chose to start to -- essentially, out of the blue, attempt
16 to -- to enforce what they believed was -- that people were
17 infringing on.

18 Q. What did you understand that they did out of the
19 blue that was that method that -- that troubled you? What
20 was it that they did that -- you know, to try to enforce
21 that? Was it just that it came out of the blue?

22 A. No.

23 Q. Okay.

24 A. That -- in my case, they -- out of the blue --
25 sent an e-mail to me alleging that I was infringing on

1 their copyrights --

2 Q. Okay.

3 A. -- and I didn't appreciate that.

4 Q. Was it the fact that it was an e-mail other than a
5 phone call? What -- what about the -- what about the
6 allegation and the way they did it you didn't -- that you
7 didn't appreciate?

8 A. In my case, it was -- for lack of a better term,
9 it was every day they were sending out something to someone
10 apparently to stop doing what we were doing. Obviously, I
11 wasn't the first one to receive an e-mail from Steve Myers.

12 Q. Okay. Is there some other way that you would have
13 seen or preferred that First Racing ask people not to
14 infringe on its copyrights other than by e-mail to people,
15 like you got?

16 A. I never really thought about it --

17 Q. So it --

18 A. -- honestly.

19 Q. Now, at the time that you received this e-mail
20 from -- first, from Mr. Myers --

21 A. Uh-huh.

22 Q. -- what was it that he was asking you to stop
23 doing?

24 A. He asked me to -- he asked for my cooperation in
25 removing any and all content that I had put up on the web

1 that infringes on First copyrights, which includes all
2 rights to the source and object code of the NASCAR racing
3 2003 season game published by Vivendi Universal.

4 Q. Okay. And do you think that that request is
5 unfair?

6 A. That request in and of itself, no.

7 Q. Was there something else about the way Mr. Myers
8 communicated with you that troubled you or made you
9 resentful?

10 A. It probably had to do, not with Mr. Myers
11 directly, but with a message that was posted on First
12 Racing's website prior to me getting this particular e-mail
13 from him that was allegedly put up by Dave Kaemmer.

14 Q. Was this the one that Mr. McArthur -- well, I
15 don't know if you know what he had to say. There was one
16 that was on the website that generally was described as
17 First accusing the Sim Racing community as being hackers
18 and thieves. Is that the one that you're talking about?

19 A. I suppose that had something to do with it, yeah.

20 Q. Now, did you actually read that posting on the
21 First Racing website?

22 A. I'm sure I did.

23 Q. Did it actually accuse anyone of being a hacker
24 and a thief?

25 A. Indirectly, yes, it did.

1 Q. It didn't mention your name, did it?

2 A. Not that I recall.

3 Q. Did it mention anybody's name in particular --
4 other than Dave Kaemmer's?

5 A. I think in that particular posting, there was some
6 mention of RedLine Developments, but I don't recall
7 specifically.

8 Q. Okay. Never accused you of being a hacker and a
9 thief?

10 A. Not directly.

11 Q. Did it accuse you indirectly of being a hacker and
12 a thief?

13 A. Sure.

14 Q. How?

15 A. He says in his e-mail to me, We will not tolerate
16 the violation of our intellectual property rights,
17 including the hacking of our executables, distribution of
18 hacked executables, creating tools intended to hack our
19 executables or distribution of such tools.

20 So if he is sending this to me, then my
21 interpretation of it is he thinks I am hacking or
22 distributing hacked executables, creating tools intending
23 to hack our executables or whatnot. So yes, indirectly, he
24 is calling me a hacker, in my opinion.

25 Q. Do any of the series that you belong to, that you

1 identified earlier today, run NASCAR 2003 software with
2 modified executables?

3 A. Yes.

4 Q. So is it the word "hack" that rankles you?

5 A. To a large extent, yes.

6 Q. If it had said modified executables, it wouldn't
7 have bothered you?

8 A. I don't know.

9 Q. Okay. While we're on it, which of the -- which of
10 the series that you gave me before runs NASCAR 2003 with
11 modified executables? Do you want me to go through the
12 list for you?

13 A. The GTP mod.

14 Q. That's the TPTCC Series?

15 A. The GTP, the one I mentioned to you a few minutes
16 ago.

17 Q. Okay.

18 A. I don't know about the rest of them. I -- I can
19 only assume that they have -- I can't even assume. I don't
20 know.

21 Q. Okay. What about the Open Wheel Racing Series, is
22 there a modified NASCAR 2003 executable that runs for these
23 series that are --

24 A. For the series that I gave you, no.

25 Q. Is there another one that does?

1 A. Yes.

2 Q. So they double-click on that icon.

3 A. Right.

4 Q. What happens?

5 A. It starts the game.

6 Q. Okay. And that means it operates the executable
7 that was downloaded as part of the zip file; is that right?

8 A. Yes.

9 Q. And then that executable engages NASCAR 2003; is
10 that right, so that it's running the NASCAR 2003 code?

11 A. Yes.

12 Q. Okay. But it's not the retail version of NASCAR
13 2003 to the eye of the user, correct?

14 A. It's not the initial splash screen that you would
15 see running the retail version of the game.

16 Q. Right. It looks different?

17 A. Yes.

18 Q. Okay. What -- other than the -- well, let me take
19 it in baby steps. This ovr2k5_v1.0.0.1.zip, that was
20 available on a website that you owned, correct?

21 A. By mistake, yes.

22 Q. When you say "by mistake," what do you mean?

23 A. It was never supposed to have been available to
24 the public.

25 Q. Okay. Well, what do you mean by that, it was

1 **never supposed to be available to the public?**

2 A. Because I received this e-mail from Mr. Myers on
3 the 4th of March of this year, and through a long series of
4 back and forth with iRacing or First or whatever we want to
5 call them today, these files were removed -- well, the
6 Sprint car file was what was specifically addressed in this
7 particular e-mail.

8 **Q. Okay.**

9 A. Development continued on this particular version
10 because we already had a version available to the public of
11 Open Wheel Racing, which did not use a modified executable.

12 **Q. Okay.**

13 A. But development on this particular application
14 continued through -- up until the time that -- or shortly
15 thereafter when I got this e-mail from Steve Myers.

16 **Q. Okay. So up until March sometime, you were --**
17 **when you say "development" -- I don't want to put words in**
18 **your mouth -- what does that mean?**

19 A. Creating this executable.

20 **Q. Okay. And so were you part of the team that was**
21 **developing this executable?**

22 A. Yes.

23 **Q. Okay. And when you say "development occurred,"**
24 **what does that mean?**

25 A. In the context of what?

1 Q. Well, in your answer a moment ago -- I'm just
2 trying to understand what your answer meant. You said that
3 the development occurred up through the time or just after
4 the time that you received the March e-mail from
5 Steve Myers. So I'm trying to understand when you use the
6 term "development occurred," what that --

7 A. Creating models for these particular cars,
8 painting those cars, creating some different artwork
9 associated with those cars. I mean, that's development.

10 Q. Okay. Now, I think you said earlier that there
11 was a previous version of this Open Wheel Racing 2005 that
12 was already available on your website, correct?

13 A. That's correct. It still is available.

14 Q. And that version, you said, did not modify the
15 executable, correct?

16 A. That's correct.

17 Q. So what was different about the development for
18 the Open Wheel Racing 2005 compared to the development that
19 was done for the previous version?

20 A. The previous version was simply modified track INI
21 files, which adjusted grip to the track to -- I mean that's
22 pretty much it.

23 Q. Okay.

24 A. We replaced models -- open wheel models with, I
25 believe, PTA models, as I recall, and modified some grip on

1 tracks. I mean, that's what created the existing open
2 wheel racing files that are out there today.

3 MR. SCHWARTZ: Could you read back the
4 previous answer?

5 (Requested Portion was Read.)

6 Q. (BY MR. SCHWARTZ) So when you say you replaced
7 open wheel models with PTA models, what does that mean?

8 A. I said I replaced PTA models with open wheel
9 models.

10 Q. Okay. I -- that's what I thought you meant.
11 Okay. So what's a PTA model?

12 A. A PTA model is one of the cars or a set of the
13 cars that were released by Project Wildfire at some point
14 in -- sometime. I don't remember when.

15 Q. Okay. So -- but all of this was modification to
16 the NASCAR 2003 retail product, correct?

17 A. It was simply in addition to -- or an adjunct to
18 the existing retail product.

19 Q. So the -- okay. I got it. So now my question to
20 you is: What about the development was different for the
21 Open Wheel 2005 where there -- I think you testified was
22 modification to the executable versus the previous
23 iteration where you just said they're -- you replaced --

24 A. We refined models to 2005 type specifications.

25 Q. Okay.

1 A. We updated artwork and we modified the executable
2 rather than change track INI files to add more grip or
3 anything like that. We simply modified the executable --

4 Q. Okay.

5 A. -- to achieve the mechanical -- the physics affect
6 that we were looking for that would best simulate an open
7 wheel race car.

8 Q. Okay. Now, you used the term "we" throughout.
9 Who in addition to you was involved in that?

10 A. I think they're the same couple of people that
11 are -- that I specified in --

12 Q. You're going to your interrogatory responses -- is
13 that --

14 A. Yes.

15 Q. Hold on and let me get a copy of those out and we
16 can just mark those.

17 (Exhibit No. 6 was marked.)

18 Q. (BY MR. SCHWARTZ) So where are you looking in
19 your interrogatory responses that we've marked as
20 Exhibit 6?

21 A. They're simply in the answer to Interrogatory
22 No. 7, the final paragraph.

23 Q. Okay.

24 A. There's two names there, one is MaxTone and the
25 other is JoeB.

1 Q. Okay.

2 A. They were the other two that participated with me.

3 Q. What's MaxTone's real name?

4 A. Rob something -- Rob Peterson.

5 Q. And where does Rob Peterson reside?

6 A. In Arlington.

7 Q. Arlington, Virginia?

8 A. Arlington, Texas.

9 Q. Texas. Okay. And what about JoeB, who is that?

10 A. That's Joe. That's all I know him by.

11 Q. You don't know his last name?

12 A. Starts with a "B."

13 Q. Okay.

14 A. I mean, I don't -- I honestly don't know -- I knew
15 it at one point, but I don't recall what it is.

16 Q. How about Joe Barlow?

17 A. That could be it.

18 Q. Where does Mr. Barlow reside, to your knowledge?

19 A. Either somewhere in Pennsylvania or Maryland, I
20 think.

21 Q. Okay. Anybody else assist you in making these
22 modifications that were part of the Open Wheel Racing 2005
23 product?

24 A. No.

25 Q. Now, I think you said earlier that it was a

1 mistake that this was available for public download; is
2 that right?

3 A. That's correct.

4 Q. Okay. Can you explain why it was a mistake,
5 please?

6 A. It was planned to be released roughly around the
7 time that I first got an e-mail from Steve Myers. We -- I
8 think I was actually a month or so away from releasing the
9 product at that time, and the file was left on the website
10 for some reason. I don't recall exactly why, but it was
11 left up there and somehow or another, either -- I actually
12 don't know how, but it got placed into the front page of
13 OW-Racing as a link by mistake. How that happened, I don't
14 quite understand, but it did.

15 Q. Okay.

16 A. And it had -- the best I can determine it happened
17 sometime end of July, first part of August of this year --

18 Q. Okay.

19 A. -- because I wasn't here.

20 Q. Where were you?

21 A. I was on vacation.

22 Q. Okay. Does anyone other than you have the ability
23 to modify the ow-racing.com site such as placing links on
24 it?

25 A. Currently?

1 Q. At the time?

2 A. I don't know. I don't -- there wasn't suppose to
3 be anybody else, but...

4 Q. Is that -- the ability to place links or modify a
5 page, is protected by some sort of access device, isn't
6 it -- or some sort of access code?

7 A. Well, you have to log into the site and you have
8 to have access given by me to be able to perform that
9 function, yes.

10 Q. Right. That's exactly what I was asking. So
11 wouldn't -- would you have record of who you gave such
12 access to?

13 A. No. I mean, I don't have any recollection or any
14 e-mails or anything else suggesting that I gave access to
15 anyone.

16 Q. Okay. Well, when you -- help me understand the
17 process. If you wanted to give access to someone, how do
18 you do that?

19 A. Through an administrative panel on the website.

20 Q. Right. And that -- that administrative panel
21 is -- and the website is maintained by VIRTBIZ; is that
22 right?

23 A. No. The website is maintained by me.

24 Q. Okay.

25 A. The website is hosted by VIRTBIZ.

1 Q. So --

2 A. VIRTBIZ does nothing as it relates to this
3 website.

4 Q. What -- are there -- is there any record within
5 your server for VIRTBIZ that would reflect any changes in
6 access rights?

7 A. Not to my knowledge.

8 Q. The computer where this website is actually run,
9 the server, that's the one that's at USA Mobility, correct?

10 A. No.

11 Q. Okay.

12 A. This website is hosted at VIRTBIZ.

13 Q. All right.

14 A. That server is located in a VIRTBIZ facility.

15 Q. Okay.

16 A. That website is therefore located in a VIRTBIZ
17 facility wherever that -- wherever their facilities are.

18 Q. Okay. So the Torn8oAlley one is the one that's
19 residing on the computer?

20 A. Torn8oalley.com, the website, is also hosted by
21 VIRTBIZ on one of their servers.

22 Q. What is --

23 A. The dedicated race server is hosted at USA
24 Mobility.

25 Q. Okay. And that's all that's used for?

1 A. They are not related to each other, other than the
2 fact that we race on them and the results are exported off
3 of them. That's it. There's no connection between
4 torn8oalley.com the website --

5 Q. Right?

6 A. -- and torn8oalley.com the dedicated server.

7 Q. So the server that hosts the races, that's the one
8 at USA Mobility, correct?

9 A. That's correct.

10 Q. Does that have on it any other function other than
11 just hosting races?

12 A. Other than Windows XP as an operating system, no.

13 Q. Okay. So to the degree we're talking about
14 modifications or access to a website like ow-racing.com,
15 that would be taking place on a server that VIRTBIZ owns,
16 correct?

17 A. That's correct.

18 Q. Who is TMan66?

19 A. He is a administrator at ow-racing.com for
20 discussion forums, and he's also a member at
21 torn8oalley.com.

22 Q. But he was not involved in the creation of Open
23 Wheel Racing 2005?

24 A. No, he was not.

25 Q. Does the server at USA Mobility have a dedicated

1 difference is between those two?

2 A. We've already been over that.

3 Q. Well, okay. I don't know that I -- I certainly
4 know I did not ask you to compare them side by side. I do
5 know that you testified to some degree about what was in
6 Exhibit 3 earlier.

7 A. Exhibit 3 contains the -- contains a set of PWF
8 released sounds and whatnot associated with the PWF
9 Trans-Am mod that was done whenever it was done, and that's
10 what Exhibit 3 contains. Exhibit -- which one did you say?

11 Q. 5

12 A. 5?

13 Q. Yeah, I'm asking you --

14 A. Contains --

15 Q. -- because they have the same file name, right?

16 A. Yes, they do.

17 Q. Okay. Go ahead.

18 A. Exhibit 5 contains a self-installing executable to
19 install the ovr2k5 files for use with NR2003.

20 Q. And how are you -- how do you know this difference
21 based on just the screenshots?

22 A. Because I created them.

23 Q. Okay. So is it your testimony that the zip file
24 that was on First-Racing-Sucks, you created to be different
25 than the zip file that was on ow-racing.com?

1 A. Yes.

2 Q. And why did you -- well, why did you create
3 different ones under the same name?

4 A. To see what reaction I would get from First
5 Racing.

6 Q. Okay.

7 A. Knowing that they were out there just looking for
8 this kind of information.

9 Q. And what reaction did you get from First Racing?

10 A. Nothing initially, not until I was served with the
11 lawsuit stuff in August -- or whenever it was.

12 Q. So in time line, which did you create first, the
13 file that was in Exhibit 3 or the file that's reflected on
14 Exhibit 5?

15 A. I don't recall specifically, but I would guess
16 that Exhibit 5 was created before Exhibit 3.

17 Q. Now, was this ovr 2005 -- we're talking about the
18 one with the modified executable in it now -- was that ever
19 distributed on torn8oalley.com?

20 A. No.

21 Q. Let's take a look now at Exhibit 4. It is the one
22 that shows the download box and the file name being
23 owsc_nocd_temp.zip. Is that a file that was being made
24 available on torn8oalley.com?

25 A. Again, it was made available, but made available

1 by mistake.

2 Q. Okay. And so the answer to my question is yes, it
3 was available on torn8oalley.com?

4 A. Describe what you mean by "made available."

5 Q. Somebody could download that file off of --

6 A. No, they could not.

7 Q. Okay. Well --

8 A. If you mean -- go ahead, explain what you mean.

9 Q. Well, from this screenshot, it appears that the
10 user -- and I can say on the record that -- well, I don't
11 know for sure. Somebody from First Racing -- or iRacing at
12 the time -- captured this screenshot, and we're using it
13 for the purposes of just the questions we've got on your
14 administration of torn8oalley.com. But if somebody was on
15 torn8oalley.com, wanted to download owsc_nocd_temp.zip at
16 around July of 2005, could they do it?

17 A. No.

18 Q. Was there a time when they could if it wasn't July
19 of 2005?

20 A. No.

21 Q. Now, you did say a few minutes ago that it was by
22 mistake on that website; is that right?

23 A. I think what I said was the link to that file --

24 Q. Okay. I've got it. Was on the website; is that
25 right?

1 A. The link to this file was not on torn8oalley.com.

2 Q. Okay.

3 A. The link to this file was on ow-racing.com.

4 Q. Okay.

5 A. In the same context as I described the owr2k
6 file --

7 Q. Right.

8 A. -- as being a mistake, this one was contained in
9 the same set of links.

10 Q. Okay. Now, the links -- what were they links to?
11 I mean, what -- what computer was hosting these file if
12 they weren't on -- or were they on the VIRTBIZ servers?

13 A. Yes, they were on the VIRTBIZ servers.

14 Q. Okay. So do you have any explanation as to why --
15 as to why a user could apparently download this file from
16 torn8oalley.com?

17 MR. RYAN: Objection.

18 A. I don't understand what --

19 Q. (BY MR. SCHWARTZ) From the screenshot, it appears
20 that somebody is downloading owsc_nocd_temp.zip from
21 www.torn8oalley.com?

22 A. Correct.

23 Q. And I think I just heard you say it wasn't
24 available on torn8oalley.com?

25 A. That's correct.

1 Q. It was only made available on --

2 A. The link -- somebody copied this link from
3 OW-Racing into that website, and that's how they got access
4 to that file. You asked, Was this file made available on
5 torn8oalley.com --

6 Q. I get it.

7 A. -- for a user to download? I said no. And it's
8 not and it wasn't.

9 Q. So when you say "somebody copied this link" --

10 A. That's correct.

11 Q. -- you're talking about --

12 A. The link that was available on OW-Racing.

13 Q. So -- okay. And just see if you can let me finish
14 my question.

15 What you're saying is that somebody other
16 than you posted a link somewhere on torn8oalley.com that
17 allowed someone to go back to the OW-Racing page and pick
18 up this file; is that right?

19 A. No.

20 Q. All right.

21 MR. SCHWARTZ: Can I have his answer previous
22 to the no answer?

23 (Requested Portion was Read.)

24 Q. (BY MR. SCHWARTZ) What do you mean by somebody
25 copied this link into that website?

1 A. Whoever created this screenshot, whether it was
2 you, iRacing, First, whoever created this particular
3 Exhibit 4 --

4 Q. Yeah.

5 A. -- copied this link that's in the address field --

6 Q. Right.

7 A. -- from OW-Racing into another browser window, or
8 perhaps the same browser window, to get this box to show up
9 that says they're downloading owsc_nocd_temp.zip.

10 Q. Okay.

11 A. So whoever created this particular screenshot,
12 copied that link from OW-Racing either into another browser
13 window or perhaps the same browser window.

14 Q. Okay. And so where it shows under the address,
15 fileswap/owsc, is it your testimony that that was created
16 by the user to make it appear that the download was coming
17 through Torn8oAlley as opposed to some functionality that
18 was already on Torn8oAlley?

19 A. I don't understand your question.

20 Q. Well, as I understood your answer, you seem to be
21 saying that the user who created this screenshot --

22 A. Uh-huh.

23 Q. -- effectively manipulated the use of the browser
24 so that it would appear that this download was coming from
25 Torn8oAlley even though it was truly coming from the

1 ow-racing.com?

2 A. That's not what I said.

3 Q. Okay. I misunderstood what you said.

4 A. What I said was, who created this document --

5 Q. Exhibit 4.

6 A. -- Exhibit 4, copied this link, which was
7 available on OW-Racing.

8 Q. Okay. The www --

9 A. The www.torn8oalley.com/fileswap/owsc/owsc_nocd_
10 temp.zip, that particular link, the entire thing was
11 mistakenly allowed to -- to exist on ow-racing.com.

12 Q. I get it -- I think I got it.

13 A. Now, they either copied that link or they typed it
14 in like this --

15 Q. Yeah.

16 A. -- on torn8oalley.com to get this file to show up.

17 Q. Oh I see.

18 A. The file, owsc_nocd_temp.zip is named that based
19 on the e-mail that Steve Meyer sent to me on March 4th when
20 he asked for that particular link or sets of files to be
21 taken down. It was taken down by renaming the file.

22 Q. So if you took it down by renaming the file, it
23 was still available on the website as long as somebody had
24 the new file name; is that right?

25 A. No, because there where wasn't then a link to that

1 file.

2 Q. I'm sorry. I guess I'm confused and obviously you
3 know this stuff better than I do. What I'm trying to
4 understand is -- maybe -- or let me just repeat it and see
5 if I've got it right. On ow-racing.com, there was a link,
6 the address for which is what is in the address bar at
7 Exhibit 4; is that right?

8 A. That's correct.

9 Q. Okay. So that if somebody on ow-racing.com
10 clicked on that link, it would download the
11 owsc_nocd_temp.zip file?

12 A. That's correct.

13 Q. Okay. And what you're saying -- so that link, in
14 effect, directed the browser of the user to the Torn8oAlley
15 site to obtain the download; is that right?

16 A. Repeat the last part of your question.

17 Q. The link -- I'm just trying to understand the way
18 it worked at the time -- the link by which mistakenly
19 posted by which a person could download this
20 owsc_nocd_temp.zip file, when you clicked on that link on
21 your browser, which was open to ow-racing.com, it would
22 actually go to the torn8oalley.com site to obtain the file
23 for the download?

24 A. Yes, loosely speaking. I mean, that's essentially
25 how links work.

1 Q. Okay. Because, in fact, the first --

2 A. But, as I said with Exhibit 4 --

3 Q. Right.

4 A. -- somebody physically had to either copy that
5 link and put it in that browser window or type it in.

6 Q. Okay.

7 A. If you just click on a link, it opens only this
8 box, not the website and this box. That's how I know that
9 whoever created this particular document either typed it in
10 or simply did a cut and paste from a link at OW-Racing as
11 they were browsing torn8oalley.com.

12 Q. So is it your testimony that nowhere on
13 torn8oalley.com was there a link by which somebody could
14 just directly download this file?

15 A. That is correct.

16 Q. Now, can you download a file -- a file from a
17 website even if there isn't a link?

18 A. Say that again.

19 Q. Can you download a file from a website even if
20 there isn't a link?

21 A. It's possible.

22 Q. I mean, someone -- to obtain this file that's on
23 Exhibit 4, as I think you just said, you could go to this
24 website, either type or paste in this address and it would
25 download this file from Torn8oAlley even if there wasn't

1 the link on the face of Torn8oAlley; is that right?

2 A. If somebody knew this particular address of that
3 link --

4 Q. Right.

5 A. -- then yes, they could go to torn8oalley.com type
6 that in, which is what's been done here --

7 Q. Yeah.

8 A. -- and get that --

9 Q. It could download --

10 A. -- particular file.

11 Q. Okay.

12 A. Your question previously, I believe, if I
13 understood it correctly, was: Was there a link to this
14 particular file available to the users? And the answer to
15 that was no.

16 Q. Okay. The -- assuming somebody was on
17 ow-racing.com and found this mistakenly posted link --

18 A. Uh-huh.

19 Q. Is it -- are you able to, from that link, derive
20 the address that's reflected in Exhibit 4?

21 A. Yes.

22 Q. Okay. So someone could have found it that way and
23 then gone to torn8oalley.com, placed the address at the top
24 and obtained the download, correct?

25 A. Yes.

1 Twice FIR\$T.

2 Q. Okay. And then if you look at owr2k5, which is
3 reflected on Exhibit 5 --

4 A. Yes.

5 Q. -- where was the link to that?

6 A. On Exhibit 8?

7 Q. On Exhibit 7.

8 A. Where it says, Bite Me FIR\$T --

9 Q. Okay.

10 A. -- or in that general vicinity.

11 Q. Okay. And it's your testimony that you don't know
12 who placed those links on ow-racing.com?

13 A. No, that's not my testimony.

14 Q. Okay.

15 A. My testimony is that I don't know who made them
16 active.

17 Q. Okay.

18 A. I placed the links there.

19 Q. Okay. And who coded it such that when you put
20 your cursor on -- if you look at Exhibit 7 -- on the open
21 wheel racing image, it came up and said, Bite Me FIR\$T?

22 A. I did.

23 Q. Okay. And did you also do the same thing for the
24 Sprint car racing, Exhibit 8, where it says, Bite Me Twice
25 FIR\$T, you did that?

EXHIBIT 1B

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1 Q. The download that you said, the osc download that
2 you couldn't remember the name of that was available from
3 September 2004 through March 2005, did that include that
4 application that modified the executable?

5 A. No.

6 Q. So the executable that Don provided, which
7 operated the change the NASCAR 2003 executable --

8 A. Yes.

9 Q. -- somebody ran Don's file to change the NASCAR
10 2003 executable?

11 A. Yes.

12 Q. Who did that -- who ran that?

13 A. I ran it, for one.

14 Q. Okay. And so -- and it changed the NASCAR 2003
15 executable in some way?

16 A. Yes.

17 Q. How did it change it?

18 A. It made -- it made some changes to the -- I
19 presume some values inside the executable to allow us to
20 run Sprint cars.

21 Q. You say you presume that's what it did?

22 A. Well, that's the effect.

23 Q. Okay. But -- so you only presume it because --

24 A. I don't know specifically what it modified.

25 Q. Okay.

1 A. It's a self-installing executable that has Sprint
2 car models, paint jobs, some other minor artwork changes --
3 I don't recall exactly how many, but a few -- and
4 basically, whatever was necessary to run the Sprint car
5 mod.

6 Q. Uh-huh.

7 A. That's what it's about.

8 Q. And when you operated, you unzipped that owsc file
9 and you -- it created an icon on the desktop just like the
10 other one that you testified to, the ovr2k5 file?

11 A. As I recall, yes, it does create an icon on the
12 desktop.

13 Q. Okay. And when you double-clicked on that icon,
14 what would happen?

15 A. You'd be racing Sprint cars.

16 Q. So it would operate with the NASCAR 2003 that the
17 user already owned --

18 A. Correct.

19 Q. -- to give them a different image that they're
20 racing with different physics --

21 A. Correct.

22 Q. -- but different from the retail version?

23 A. Yes.

24 Q. Would that Don be Don Mullins?

25 A. I don't --

1 Q. You don't know?

2 A. I don't know.

3 Q. Okay.

4 A. I mean, obviously, people are feeding you
5 information. I don't have the slightest idea what the
6 guy's name is, Don something or other.

7 Q. Just like your attorney is not sitting next to
8 you; my client is not sitting next to me. So that's how I
9 get the --

10 A. That doesn't sound like the right name, but I
11 honestly don't know. I'd have to go dig through the member
12 list at OW-Racing --

13 Q. Okay.

14 A. -- to see if he was even still on there.

15 Q. He was a member at one time?

16 A. At one time, at least in September of 2004.

17 Q. Okay.

18 A. If he is today, I have no clue.

19 Q. That member list, is that archived somewhere?

20 A. No.

21 Q. Okay. So when you say "dig through the member
22 list," you're talking about --

23 A. It's available online.

24 Q. You're talking about presently registered members?

25 A. Yes.

1 Q. You don't have an archived list of the older
2 members?

3 A. No.

4 Q. How did you get this file? Did it come to you by
5 e-mail, this thing that Don sent you?

6 A. Well, it was either e-mail --

7 Q. Uh-huh.

8 A. -- or it was via a instant messenger client or
9 perhaps a link somewhere else on the Internet. I honestly
10 don't remember what mechanism I got the file.

11 Q. But you tested it in some way to figure out what
12 it did, right, presumably?

13 A. No. I just followed the instructions that came
14 with it --

15 Q. Okay.

16 A. -- which said, Put it in this folder and
17 double-click on it. That's it.

18 Q. And you did that without knowing who sent it -- it
19 could have been infected or something like that with a
20 virus and you didn't care?

21 A. No. I knew who was sending it to me.

22 Q. Okay. Could it be Don Wilshe?

23 A. Could be.

24 Q. Okay.

25 A. That sounds closer to it than Mullins.

1 what the image on the screen was, that it was actually
2 operating like the physics of a Sprint car?

3 A. Yes.

4 Q. Okay. And you, likewise, are able to do the same
5 thing for NASCAR cars, so you can judge there's a
6 difference between the two?

7 A. I can tell a difference between the different
8 series that are available, yes. If that's your question,
9 then yes.

10 Q. Did you have any input in how that Sprint car
11 physics was supposed to operate?

12 A. No.

13 Q. Okay. Just whatever Don -- whatever variables Don
14 put into his application, you perceived that it made the
15 game operate like a Sprint car?

16 A. Yes.

17 Q. Okay. And so -- but you had nothing to say about
18 what variables he or she used in generating that?

19 A. No.

20 Q. Did anyone ever explain to you what -- how those
21 variables were --

22 A. No.

23 Q. -- obtained?

24 So you -- you received from Don basically a
25 preset set of variables that would be used to modify the

1 **NASCAR 2003?**

2 A. I received a small application from him by which I
3 double-clicked on, and it did something to the NR2003
4 retail executable.

5 Q. Uh-huh.

6 A. What it modified, the values it used or anything
7 else, I have no idea. All I know is the end result was a
8 Sprint car executable that acted and behaved like a Sprint
9 car would or should or could. That's it.

10 Q. Now, did you have a Sprint car modification prior
11 to what you received from Don? Was there already something
12 that you were offering or that your series --

13 A. No.

14 Q. Okay. So this was basically a new series that was
15 as a result of Don's application?

16 A. Yes.

17 Q. Did you communicate with Don? Did you send an
18 e-mail back to him or anything as a result of him sending
19 you this?

20 A. Not that I recall.

21 Q. Did he communicate with you in any way?

22 A. Through the discussion forums on OW-Racing, that's
23 it.

24 Q. Okay. So the discussion forums are like a
25 bulletin board where somebody posts something and somebody

1 you by which you could obtain the information as to the
2 number of attempted downloads for the two files or three
3 files at issue here?

4 A. Not that I'm aware of.

5 Q. How -- relating to the ovr2k5 file that was
6 mistakenly linked, according to your previous testimony,
7 how long was that available on the ow-racing.com?

8 A. The best I can determine, sometime towards the end
9 of late July until I returned back from vacation in
10 August -- I believe I got back on the 5th or 6th of August,
11 if I recall correctly.

12 Q. A couple of weeks maybe?

13 A. Two weeks at most, I'm guessing. I don't know
14 specifically. All I know is when I got back off vacation,
15 I had -- there was an e-mail from my web host to me that
16 was basically from Ms. Jordon -- I forget the name you guys
17 had for it, but it was some take down name or something.

18 Q. Right.

19 A. When I got that from my web host, the files --
20 when I got back off vacation and saw that e-mail is when it
21 was taken down. So I think the first time I talked to you
22 was maybe -- I don't know, the 10th or something like
23 that -- the 12th of August, and the files were down before
24 that. So somewhere between the 5th and the 10th is when
25 they were taken down.

1 Q. So the executable that was the modified version of
2 NASCAR 2003, retailed executable, you created that?

3 A. Yes.

4 Q. What did Joe do as part of the project?

5 A. Some artwork.

6 Q. Okay. Anything else?

7 A. Did some 3-D work, helped with researching the
8 specifications as it were for an open wheel style car.
9 That's pretty much it.

10 Q. And what did Rob Peterson do?

11 A. Primarily, 3-D modeling.

12 Q. So would you say that you did the bulk of the work
13 on this?

14 A. No. It's incredibly more difficult to do 3-D
15 modeling than it is to do some other stuff.

16 Q. Now, when someone -- when someone downloads the
17 ovr2k5 package that was available through ow-racing.com and
18 operates the executable that you created, does that
19 executable then create a copy of the NASCAR 2003 game into
20 random access memory?

21 A. Say that again.

22 Q. Well, I'll ask it a different way.

23 When you run the executable that you created,
24 what does that do?

25 A. Starts up the game.

1 Q. And did those occur throughout the period of
2 September 2004 through March of 2005?

3 A. No.

4 Q. When did they occur?

5 A. Before September 2004.

6 Q. Okay. So you had a bunch of test races before it
7 was released?

8 A. Yes.

9 Q. After it was released, were there any races that
10 you know of where people used that mod to race against each
11 other?

12 A. I don't know.

13 Q. You never participated in one?

14 A. I participated in one at torn8oalley.com.

15 Q. Okay. And when was that?

16 A. I don't recall. I'd have to go dig through some
17 standings to see.

18 Q. So that would be reflected somewhere?

19 A. Yes.

20 Q. Okay. Where would that be reflected?

21 A. On torn8oalley.com.

22 Q. Okay. And your recollection is that open wheel
23 Sprint car mod was only used for one race on
24 torn8oalley.com?

25 A. That's correct.

1 Q. How many people race in that race, to your
2 recollection?

3 A. I have no idea.

4 Q. Would that also available in the --

5 A. Possibly.

6 Q. Are you aware of any other races off of
7 torn8oalley.com that use that mod?

8 A. No.

9 Q. Did you do any beta races for the ovr2k5 mod?

10 A. No.

11 Q. No one tested that against each other?

12 A. You asked if we conducted any races, and I said
13 no.

14 Q. Right. I'm asking you a broader question.

15 Did anyone race against each other, to your
16 knowledge, using that mod?

17 A. In a race?

18 Q. In any type of test.

19 A. Yes.

20 Q. And when was that?

21 A. January 2005.

22 Q. So that would have been six or seven months --
23 eight months even before it was available through these
24 mistakenly posted links?

25 A. That's correct.

1 Q. Okay. How many such -- can I call that a test
2 race; is that fair?

3 A. No. Call it a practice session.

4 Q. Okay. How many practice sessions --

5 A. I have no idea.

6 Q. Did you participate in them -- any?

7 A. Yes.

8 Q. And were they on the server that you maintained in
9 Plano?

10 A. Yes.

11 Q. And the ones that you participated in, how many
12 other racers, as best you can recall?

13 A. Two or three at any given time.

14 Q. Was there any scheduled periodic practice sessions
15 like that, like once a week or once a month or anything
16 like that?

17 A. No.

18 Q. Who would arrange for such a practice session?
19 How did anyone else know to show up other than you?

20 A. Well, the server was open to --

21 Q. Right.

22 A. -- the people that were beta testers as it were.

23 Q. And then they communicate among themselves as to
24 when they wanted to do a practice session?

25 A. Well, they knew that the server was open 24/7 --

1 Q. Right.

2 A. -- so they just connect to it and run whenever
3 they wanted to. I didn't have to be there to do anything.
4 It was running.

5 Q. What had to run on the server to allow members or
6 people with access --

7 A. Just the application. The ovr2k5 application has
8 to be running just like any other application has to be
9 running.

10 Q. So that was loaded onto the server in Plano --

11 A. That's correct.

12 Q. -- and that allowed people around the country --
13 or around the world, for that matter -- to connect to that
14 server?

15 A. No.

16 Q. No?

17 A. You still had to know how and where to connect to.

18 Q. Well, you didn't let me finish my question. I was
19 going to say if they had the right IP address.

20 A. If they had the right IP address and they were a
21 member of the beta test team, then they had access to that
22 information.

23 Q. Right. And that information was -- when you say
24 "information," you're talking about the application,
25 correct?

1 generally speaking, from Thursday nights to Sunday
2 afternoons. And during that time, it was available 24/7
3 because those were periods where we're not having league
4 races.

5 Q. Okay.

6 A. That's when -- during that specific period of time
7 was when those guys were allowed to test the prereleased
8 versions of that particular mod.

9 Q. Okay. And when you say "those guys" --

10 A. The beta testers.

11 Q. And do you know who they are? Are you able to
12 identify some of them?

13 A. No.

14 Q. Any of them?

15 A. Not right this minute, no.

16 Q. Do you have a list somewhere as to who they were?

17 A. Perhaps.

18 Q. Where would that be?

19 A. On the website.

20 Q. On which one, the Torn8oAlley website?

21 A. No. OW-Racing.

22 Q. Okay. Are you aware of anyone using the owr2k5
23 modification to race outside of the testers that you were
24 just describing?

25 A. Right now?

1 Q. At any time.

2 A. No.

3 MR. SCHWARTZ: I've got, what is now, 12:35.

4 Do you want to take a break for lunch?

5 THE WITNESS: That's fine with me.

6 (Break was taken from 12:36 p.m.

7 to 1:28 p.m.)

8 Q. (BY MR. SCHWARTZ) Back on the record. Remember,
9 Mr. Robinson, you're still under oath?

10 A. Yes.

11 Q. Take a look, if you -- do you have the exhibits
12 from earlier today over there somewhere?

13 A. Uh-huh.

14 Q. Okay. Take a look at Exhibit 3 again, if you
15 would.

16 A. Okay.

17 Q. Do you have that? And also, if -- I'm going to
18 have you compare it with Exhibit 5. Your testimony is that
19 Exhibit 3 represented a file that contained sounds from the
20 old Project Wildfire -- Project Wildfire sounds; is that
21 right? That's the download reflected on Exhibit 3.

22 A. As component of that download, yes.

23 Q. Okay. And your testimony is that it did not
24 include the modified executable of NASCAR 2003; is that
25 right?

1 A. That's correct.

2 Q. Well, why is it then that the download on
3 Exhibit 3 and the download on Exhibit 5, which have the
4 same file name, are exactly the same size?

5 A. That's the way I made it.

6 Q. So you filled it with stuff so that it would just
7 look to be the same size?

8 A. Yes.

9 Q. And then have you -- after this download was
10 taken, the 52.1 megabyte download, did you then change what
11 was available on first-racing-sucks.com as far as the
12 download with that name on it?

13 A. Not that I recall.

14 Q. Okay. Let's -- I took your advice and got on the
15 Internet. Let's take a look at first-racing-sucks.com,
16 which I hope I'll be able to accomplish here. While that's
17 heating up, let me ask you another question.

18 MR. SCHWARTZ: Joe, I've just turned on a
19 projector.

20 Q. (BY MR. SCHWARTZ) Don't you keep logs of the chat
21 rooms of torn8oalley.com?

22 A. Do I keep logs of what? Say it again.

23 Q. Do you keep chat logs for torn8oalley.com?

24 A. In what respect?

25 Q. Well, do you keep any archive of the bulletin

1 boards at torn8oalley.com?

2 A. No.

3 Q. Is there a chat feature for torn8oalley.com that's
4 not the bulletin boards?

5 A. I don't believe so.

6 Q. Okay. So -- and we'll go to it in a minute, but
7 where you say in torn8oalley.com that there's an archive
8 chat log to ensure that people aren't abusive, that's just
9 not true?

10 A. I don't believe I said that.

11 Q. Okay. All right. We've got up on the screen --
12 is this the -- is this your website,
13 first-racing-sucks.com?

14 A. Looks like it, yes.

15 Q. Okay. And it says, You know why you're here, so
16 go ahead and enter?

17 A. Uh-huh, yes.

18 Q. I'm just going to print this screen. And then
19 I'll go through -- clicking through to where it says, You
20 know why you're here, so go ahead and enter. And this is
21 the first page inside the splash screen; is that right?

22 A. Yes.

23 Q. Now, is there, on this website, a version of
24 ovr2k5 available for download or a file with that name?

25 A. Is there a file available what?

1 Q. Is there a file available for a download on
2 first-racing-sucks.com known as owr2k5 as we speak today?

3 A. Available for download meaning what?

4 Q. Meaning that there's some sort of link on here
5 that you can click on and it shows that -- at least it
6 appears that you're supposed to be able to download this
7 file, owr2k5?

8 A. No.

9 Q. When was the last time that that file was
10 available?

11 A. There was never a link on this site that led to a
12 download.

13 Q. So when we looked at Exhibit 3, are you saying
14 that that wasn't a download available on this site?

15 A. No. You asked if there was a link to a download
16 to that file. I said no.

17 Q. I see. So the answer to my question is no,
18 because it's not a link; is that right?

19 A. You asked if there was a link on this site to that
20 file. The answer to that question is no.

21 Q. Right. Is this file available on the site in some
22 way or another?

23 A. That file exists within a folder in a directory on
24 that web server, yes.

25 Q. Okay. And how would one get to it from this page?

1 A. You wouldn't. It's not available.

2 Q. So if -- if you had the address for the folder on
3 this site, you could download it the same way that other
4 file was available on Torn8oAlley?

5 A. Yes.

6 Q. Okay. And what is the address for that file on
7 first-racing-sucks.com?

8 A. I'm not sure. I'd have to log in as an FTP
9 administrator and look.

10 Q. Okay. As far as you know, though, what's
11 available now is the same as what was available on
12 Exhibit 3, the same file?

13 A. Yes.

14 Q. Which doesn't include a modified executable?

15 A. That's correct.

16 Q. Okay. Now, let's go over to -- this is
17 ow-racing.com, right? This is your site?

18 A. Yes.

19 Q. And there's no links here anymore on the open
20 wheel racing?

21 A. To the best of my knowledge, yes, there's not.

22 Q. Or on the Sprint car racing?

23 A. Right.

24 Q. But we can tell from this the number of members;
25 is that right? Does that -- that shows the number of

1 A. Yes.

2 Q. Okay. And did you -- I think you've already
3 addressed this in your interrogatory responses, but let's
4 just get it on the record. When you installed NASCAR 2003,
5 did you accept the end user license agreement that was --

6 A. Yes.

7 Q. -- part of that?

8 To your knowledge, did Joe Barlow own a copy
9 of NASCAR 2003 when he was working with you on that
10 development team?

11 A. I can only assume that he did.

12 Q. Okay. Why do you assume that he did?

13 A. Because he was involved in testing, so...

14 Q. You needed to have a copy of NASCAR 2003 in order
15 to be able to run it, correct?

16 A. Yes.

17 Q. Okay. And same question for Rob Peterson --

18 A. Yes.

19 Q. -- as far as you know, do you assume he had a
20 copy --

21 A. I know he had it because I've been to his house.

22 Q. Okay. You saw the copy of the box or something
23 like that?

24 A. I saw it on his PC.

25 Q. Okay. When you were doing the development work

1 for the ovr2k5 did -- strike that.

2 Where did you get your copy of NASCAR 2003?

3 A. Some store. I don't know where.

4 Q. You bought it at a retail store here in Texas?

5 A. Yes.

6 Q. Have you -- I think we -- earlier this morning, we
7 spent some time talking about how the no CD file was
8 created, and you said you ran one file against the retail
9 version of NASCAR 2003, correct, to identify --

10 A. No, that's not what I said.

11 Q. Okay. Well, you did say that you did a compare
12 function between two files?

13 A. Yes, I did.

14 Q. And that helped to identify the code that was
15 related to the CD -- the requirement in NASCAR 2003 that a
16 CD be in a drive in order to be able to run, correct?

17 A. No, that's not what I said.

18 Q. Okay. Well, now I'm asking you: Is that what you
19 did, the compare function allow you to identify the code
20 that required the disk to be in the drive to run NASCAR
21 2003?

22 A. No.

23 Q. Okay. Well, then what did you -- once --

24 A. As I said, I took an existing no CD file from
25 another website, compared that to the owsc executable and

1 noted the differences and made the changes accordingly so
2 that owsc could load with a no CD patch commonly available
3 all over the world.

4 Q. Okay. So what file did you get -- what did you
5 use as the comparison to the owsc file?

6 A. An existing no CD file that I found somewhere on
7 the web.

8 Q. Was it a no CD file relative to NASCAR 2003?

9 A. Yes.

10 Q. Okay. And you don't know where you found it on
11 the web?

12 A. It could have been any number of places.

13 Q. So does that mean --

14 A. I don't remember.

15 Q. Okay. And was it in one of the racing series that
16 you previously testified to? In other words, was it
17 already in the truck version or --

18 A. No. It's a separate file. It's not part of the
19 retail game.

20 Q. Right.

21 A. It's not part of the mod as it were for the
22 Craftsman Truck Series or the Busch Series or anything
23 else. It's a separate file. Somebody created it, if I'm
24 not mistaken. I'm sure they even had it on the PWF site at
25 one time. I don't know where I got the no CD file that I

1 used. I got it, I compared it, I made changes accordingly.

2 Q. Now, is there a no CD file in the owr2k5 version?

3 A. I don't remember.

4 Q. Why did you think it was important to make a no CD

5 file available for the owsc version?

6 A. People asked for it.

7 Q. How did they ask for it?

8 A. They made a request on the --

9 Q. On the bulletin board?

10 A. -- on OW-Racing.

11 Q. Okay. And that was enough to have you do the

12 work, someone requesting it?

13 A. Yes.

14 Q. Do you run the OW -- the no CD file on your own

15 version?

16 A. No.

17 Q. Why not?

18 A. Because I don't need it.

19 Q. Because you have a copy of the game, right?

20 A. Yes, I have a copy of the game.

21 Q. And you run that in your disk drive?

22 A. No, I don't.

23 Q. Why don't you need it if you don't need to run the

24 disk?

25 A. Because I run another utility that makes a copy as

1 it were of that image and can run from the hard drive.

2 Q. Okay. So that utility allows you to avoid using
3 the CD in the hard drive?

4 A. Yes.

5 Q. And what is that utility called?

6 A. BlindWrite.

7 Q. And where did you get that one?

8 A. I have no idea. It came off the web somewhere.
9 It's a commonly available piece of software. It's not
10 anything untoward, as it were.

11 Q. Do you think -- does the BlindWrite software that
12 you use -- is that better than the no CD patch in a sense
13 of better functions or something?

14 A. I personally think it is.

15 Q. Why not just distribute that rather than the no CD
16 patch?

17 A. Why not distribute what?

18 Q. The BlindWrite.

19 A. I don't own it.

20 Q. You paid to license it?

21 A. Yes.

22 Q. Okay.

23 A. I use it for a number of things. It's not just
24 something I use for NR2003.

25 Q. So as I understand it, the BlindWrite allows you

1 to -- well, you tell me. How does it allow you to bypass
2 the functionality in NASCAR 2003 that requires a disk to be
3 in the drive?

4 A. There's nothing that requires a disk to be in the
5 drive. Okay. All that's required is that you have a valid
6 license key to run your version of the game. There are
7 tons -- literally tons of these tools available that will
8 image a particular application so you can run it from a
9 hard drive. That's what I choose to use.

10 Q. Okay. So if you use that tool to be able to do
11 that, could you then make a copy of the image and save it
12 somewhere else?

13 A. Could I make a copy of what image?

14 Q. Well, whatever it is that that BlindWrite is
15 copying so that you need not run the disk in the machine
16 and allows you just to run the game, because you can't --
17 well, let me take a step back.

18 If you didn't have BlindWrite, would you be
19 able to run NASCAR 2003 without the disk being in the
20 drive?

21 A. No.

22 Q. Okay. So something about NASCAR 2003 seems to
23 require that there be a disk in the drive in order for it
24 to be played, correct?

25 A. Those are your words. I -- I mean, I don't -- I

1 used the disk one time to install the game on my PC. I
2 haven't used it since.

3 Q. I understand that.

4 A. So I can't answer the question as to is there some
5 mechanism required for a disk drive to be in there. To
6 install it initially, yes. To use it constantly, one could
7 assume that. I don't do that. I don't use that. I
8 literally have the CD put up on my shelf and it stays in
9 the CD case. I don't use it.

10 Q. I understand that.

11 A. Unless I have to reinstall for some reason.

12 Q. Okay. But the tool that you use -- as I
13 understood your testimony -- so that you don't have to have
14 the disk in the drive, so you can leave it up on the
15 shelf --

16 A. Uh-huh.

17 Q. -- is BlindWrite?

18 A. That's correct.

19 Q. And as I think I heard you say, BlindWrite creates
20 a copy of something that allows you to do that, to not put
21 the disk in the drive; is that right?

22 A. Yes.

23 Q. Okay. So now what I'm asking you is: From that
24 copy that BlindWrite creates, can you send that copy to
25 somebody else, if you wanted to, as a file?

1 A. Could I send that file to somebody else?

2 Q. Yeah.

3 A. Yes.

4 Q. And could they then install it and run your
5 version of NASCAR 2003 if they wanted?

6 A. No, they could not.

7 Q. Why not?

8 A. Because they haven't installed it with the proper
9 CD key. The CD key is in the registry of Windows and it's
10 encrypted.

11 Q. I got it.

12 So you could send a copy of the game, but it
13 just wouldn't be operable unless someone had your --

14 A. First of all, it wouldn't work unless they had
15 BlindWrite.

16 Q. Okay.

17 A. Second of all, it wouldn't run because they
18 wouldn't have the right CD key.

19 Q. Okay. Those are the two things.

20 A. So it's a 500 meg boat anchor, if you will.

21 Q. What does your -- what's your educational
22 background, please?

23 A. What is my educational background?

24 Q. Yes.

25 A. Graduated high school. Graduated college. Spent

EXHIBIT 1C

Deposition Pages

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1 Q. So these are not commercially available tools?

2 A. No.

3 Q. Are you -- in the context of your military
4 experience or thereafter, are you familiar with the use of
5 reverse engineering tools?

6 A. Yes.

7 Q. What tools are you familiar with -- reverse
8 engineering tools?

9 A. Only the tools that I use.

10 Q. Which are?

11 A. Ultra Edit.

12 Q. Okay. Anything else?

13 A. No.

14 Q. Did you use Ultra Edit in connection with your
15 work on owr2k5?

16 A. Yes.

17 Q. And did you use Ultra Edit in connection with the
18 release of the owsc version that was previously out from
19 September of 2004 through March of 2005?

20 A. For the owsc?

21 Q. Yeah.

22 A. No.

23 Q. Okay. What files -- strike that, start again.

24 Did you use the Ultra Edit on the NASCAR 2003
25 executable file?

1 A. Yes.

2 Q. Did you use it on any other files that were part
3 of the NASCAR 2003 retail package?

4 A. Yes.

5 Q. What other files did you use it on?

6 A. It's also a text editor, so I used it as a text
7 editor.

8 Q. Okay. Did you use it as a text editor in
9 connection with the NASCAR 2003 executable file?

10 A. No.

11 Q. Okay. How did you use it in connection with the
12 NASCAR 2003 executable file?

13 A. It's a hex editing tool. It has a hex editing
14 function in it.

15 Q. So you used it as a hex editor?

16 A. Yes.

17 Q. Did you use any other tools in connection with
18 your work on the NASCAR 2003 executable file?

19 A. In connection with what?

20 Q. With your work on the NASCAR 2003 executable file
21 as part of your development of ovr2k5?

22 A. Okay. You've got to break it down piece by
23 piece --

24 Q. Okay.

25 A. -- in order for me to answer that question

1 correctly.

2 Q. All right. Did you use any other tools in
3 connection with the NASCAR 2003 executable -- other than
4 the Ultra Edit.

5 A. No.

6 Q. Okay. Did you use any other tools in connection
7 with your work as a developer on ovr2k5?

8 A. Yes.

9 Q. What other tools did you use?

10 A. 3DS Max.

11 Q. That's 3DS Max? Is that what you called it?

12 A. Yes.

13 Q. And what does 3DS Max do?

14 A. It's a 3-D modeling tool.

15 Q. Okay. But from your previous response, you didn't
16 use that for your work on the executable. You used it for
17 other parts on the file, correct?

18 A. For 3-D parts. That's why it's called 3-D.

19 There's nothing associated with 3DS Max that applied to the
20 executable file.

21 Q. I got it.

22 Did you use any other tools in connection
23 with your work on the ovr2k5 other than Ultra Edit and
24 3DS Max?

25 A. Yes.

1 Q. What other tools did you use?

2 A. Winmip2.

3 Q. What does Winmip2 do?

4 A. Winmip2 takes a car file out of the NR2003 game
5 and allows me to export it so I can paint it or any number
6 of other things, but it's a utility that's been around
7 since the N4 days, as I recall.

8 Q. Okay. And presumably, you did not use Winmip2
9 with respect to the NR2003 executable?

10 A. Not with the executable, no.

11 Q. Okay. Any other tools that you used --

12 A. Not that I recall.

13 Q. -- with the -- let me just finish my sentence so
14 she's got it on the record -- with respect to the work on
15 the ovr2k5 file?

16 A. No.

17 Q. Okay. Now, do you, in the context of your
18 military training, get experience in developing Microsoft
19 Windows operating software -- or operating systems
20 software?

21 A. No. Microsoft didn't exist when I was in the
22 military.

23 Q. Okay. Since you left the military, do you have
24 experience in developing for the Microsoft Windows system?

25 A. No.

1 set up your steering wheel and pedals and all of that to
2 jump in a car and race. They both do that.

3 Q. Okay. Does rFactor allow for multiplayer use?

4 A. Yes.

5 Q. And so does NASCAR 2003?

6 A. Yes.

7 Q. Do you perceive when you use rFactor that the
8 physics models are lifelike?

9 A. I don't know. I've never driven one of those
10 types of race cars.

11 Q. Well, do you perceive that the physics model in
12 the NASCAR 2003 product are lifelike?

13 A. They're similar to what I've experienced, yes.

14 Q. Okay. Are the rFactor cars different from the
15 NASCAR 2003 cars in the sense of the nature, whether it's
16 stock cars or --

17 A. Yes.

18 Q. What are the rFactor cars?

19 A. Sports car type cars. I mean, if you're familiar
20 with -- well, everything that ships with rFactor is made
21 up. So none of that stuff really exists. They're just
22 made-up cars.

23 Q. Okay. So it's not -- they're not --

24 A. They're not modeled after -- I don't know. All I
25 can do is look and see what they look like, and they don't

1 look like anything that I see on television.

2 Q. Okay. And NASCAR 2003, it does look like things
3 you can see on television?

4 A. Yes.

5 Q. Okay. And the tracks on rFactor, are those
6 modeled after real tracks, to your knowledge?

7 A. That ship with the game?

8 Q. Yeah.

9 A. No.

10 Q. And the tracks in NASCAR 2003, are those modeled
11 after real tracks, to your knowledge?

12 A. To the best of my knowledge, yes.

13 Q. Okay. Is it fair to say that the NASCAR 2003
14 product simulates the driving of a four-wheel vehicle
15 through a known environment reflecting a track?

16 A. Say that again.

17 Q. Is it fair to say that NASCAR 2003 simulates the
18 driving of a four-wheel vehicle through a known environment
19 like a race car track?

20 A. Yes.

21 Q. Okay. And it also simulates the experience of
22 driving the car for the user of the software, to your
23 understanding, correct?

24 A. It's capable of that, yes.

25 Q. And it purports to make it drive like a real race

1 car; is that right?

2 A. So they say.

3 Q. And to your understanding, does NASCAR 2003 permit
4 users to change the environment that they perceive they're
5 driving through?

6 A. Yes.

7 Q. That's one of the characteristics of the game is
8 to allow people to do that, correct?

9 A. Yes.

10 Q. Okay. Is it also fair to say, based on your
11 experience, that NASCAR 2003 does not permit the user
12 without special expertise to change the physics formulas
13 that are contained in it?

14 A. To change the physics formulas contained in what?

15 Q. In NASCAR 2003.

16 A. Can you say that again?

17 Q. There's no -- in the NASCAR 2003 retail product,
18 there is no express way for a user to change the physics
19 models? It's not an option that they can choose?

20 A. In the retail game?

21 Q. Right.

22 A. No.

23 Q. You have to be someone who has experience in
24 computer software editing, such as you, to be able to
25 change the physics models, don't you?

1 A. No.

2 Q. Or you need to have a tool like what Don sent you
3 in order to be able to change the physics models, don't
4 you?

5 A. No. I mean, you're talking semantics here.

6 Q. Okay.

7 A. If I went today and took that game that you got in
8 the mail here this morning and loaded it on a PC, that
9 loads the retail version of that game.

10 Q. Right.

11 A. Then if I go to even one of my websites and
12 download the Busch mod or the Craftsman trucks mod, that
13 modifies the files. That modifies the physics so that
14 those two cars can run then in the game. So to say that
15 you need to be an expert to do that is not true.

16 Q. Okay.

17 A. You can simply download a file and install it.

18 Q. So when you're using the term "physics" there,
19 you're talking about the INI file as opposed to --

20 A. No. I'm talking about the handling
21 characteristics of a given vehicle. In other words, for a
22 truck, the truck has completely different physics than the
23 Winston Cup car. The Winston Cup car weighs 3,400 pounds.
24 The Craftsman truck weighs whatever it weighs. It has --
25 at certain tracks, you are allowed to run a different sized

1 spoiler or a different degreed spoiler. In Winston Cup
2 tracks, it's fixed. You can't change it. So those are the
3 physics and that's in the game.

4 Q. Okay. Are there ways to adjust the physics in the
5 game that don't involve modifying the executable?

6 A. As I said, if I start the truck series, then I run
7 with truck physics.

8 Q. Right.

9 A. If I start the Winston Cup Series, I run with
10 Winston Cup physics. If I start the TPTCC mod, I run the
11 with the PWF Trans-Am physics. It depends on which series
12 I go in and run.

13 Q. But my question to you is: For some of those --
14 and we can go through them -- I think you previously
15 testified that the modifications did not involve the
16 modification of the executable?

17 A. That's correct.

18 Q. And in others, it did involve the modification of
19 the executable?

20 A. That's correct.

21 Q. And the modification of the executable, among
22 other things, perhaps, accomplishes a change in the
23 physics, doesn't it?

24 A. It can, yes.

25 Q. So when the retail buyer of NASCAR 2003 installs

1 (Requested Portion was Read.)

2 THE REPORTER: If you wouldn't mind,
3 Mr. Robinson, kind of let him finish his questions. We're
4 overlapping a lot since we've come back from lunch.

5 Q. (BY MR. SCHWARTZ) I'm sorry. Usually, I give
6 that as part of my admonitions at the beginning of the
7 deposition to let me finish my question before you give
8 your answer -- you probably know what I'm asking -- because
9 it's easier on the court reporter.

10 Do you -- do you also own a copy of Hex
11 Workshop 4.2 -- or did you?

12 A. No.

13 Q. Why did you commence work on the ovr2k5? What
14 were you hoping to accomplish?

15 A. It was a follow-on to the original open wheel mod
16 that we did.

17 Q. The original one being the one that's the subject
18 of Exhibit 9?

19 A. Yes.

20 Q. Okay. And what -- what was your goal as far as
21 creating a follow-on? What did you want to accomplish?

22 A. I wanted a up-to-date, realistic version of an
23 open wheel car.

24 Q. Did you think that the version that was reflected
25 on Exhibit 9 was not realistic?

1 A. To some extent.

2 Q. Well, what about it was unrealistic, in your mind?

3 A. The method we used to create down force, as an
4 example, was bogus. It was basically an open wheel car on
5 a PTA chassis. The weight distribution on the car is not
6 the same, so we wanted a more realistic version of an open
7 wheel simulation.

8 Q. And when you say "we," you're talking about
9 yourself and Joe and Rob?

10 A. Yes.

11 Q. Okay. And what was the -- what was your interest
12 in creating that? Why -- why did you want to spend the
13 time and effort to do that?

14 A. Because I like racing. I said that before. I
15 like open wheel cars. There wasn't a good open wheel
16 simulation -- still isn't.

17 Q. The -- were there -- other than your mod that's
18 the subject of Exhibit 9, were there other open wheel
19 products on the market -- open wheel simulation products?

20 A. Not that I'm aware of.

21 Q. Did you have any concern for the effect on the
22 ownership of NASCAR 2003 by what you were doing? And when
23 I say "concern," I don't mean you were worried about that.
24 Did you think about the impact of creating open -- ovr2k5
25 to the people who owned NASCAR 2003?

1 A. No.

2 Q. So it's fair to say that you weren't doing it to
3 try to improve sales of NASCAR 2003?

4 A. No.

5 Q. No, it's not fair to say, or no, you were trying
6 to improve?

7 A. I wasn't trying to improve anything as it relates
8 to sales. The game had been off the market.

9 Q. Okay. When you say "the game had been off the
10 market," what do you mean by that?

11 A. The game wasn't available -- it's not available as
12 a new product anymore that I know of. You get it
13 secondhand through eBay or Amazon or places like that, so
14 anything I was doing would have no effect on sales
15 whatsoever.

16 Q. That's true. When did you commence work on open
17 wheel racing -- ovr2k5?

18 A. As I said before, in November roughly of 2004.

19 Q. Now, at the time that you released the mod that's
20 the subject of Exhibit 9, was the game off the market?

21 A. Essentially, I would say yes.

22 Q. When you say "essentially," what does that mean?

23 A. That means the game came out in 2003. A patch was
24 released in September of 2003, and somewhere between the
25 time the game was released and September of 2003, Papyrus,

1 Q. Well, I'm trying to understand the -- you spent a
2 lot of time on this --

3 A. Yes.

4 Q. -- and I'm trying to understand your motivation
5 for spending that time, and so far you've told me that you
6 wanted to make a more realistic product.

7 A. Right.

8 Q. And now I'm trying to explore what other
9 motivations you had.

10 A. I was simply trying to give something back to the
11 Sim Racing community for which I had downloaded Craftsman
12 Truck Series, Busch Series, TPTCC, car paints, tracks,
13 everything else. This was my contribution back to the Sim
14 Racing community.

15 Q. I see. So you would make this available, and if
16 people in the community decided that it was worthwhile,
17 maybe they would set up racing leagues or maybe not?

18 A. Could do whatever they want.

19 Q. But it -- you were going -- your intention was to
20 make it available to everybody and anybody in the Sim
21 Racing league who wanted it?

22 A. Yes.

23 Q. Okay. And was your intention to do that to make
24 it available through one of your websites?

25 A. Yes.

1 concern. If your concern is you don't remember them all,
2 that's fine. It's not a memory test. If your concern is
3 that you do remember some of them, but you don't want to
4 share -- let me finish please -- because you're worried
5 that Steve Myers or somebody else on the phone may take
6 commercial advantage of what you do remember, that's
7 another set of issues.

8 So you know, I'm -- I'm not surprised you
9 don't remember whatever the hex editing values are that you
10 put in there a year ago. Sounds reasonable to me. But I'm
11 asking -- my question wasn't directed at that. It was more
12 directed at what were the -- what was the type of
13 information. Remember, I was focusing on the weight of the
14 car. You gave me that answer.

15 A. Right.

16 Q. I said what are the other things that you were
17 trying to isolate in terms of the variables? You said
18 there was about half a dozen -- I think is what you
19 testified.

20 A. At least half a dozen. There could be more.

21 Q. Okay.

22 A. There was spring rates, shock rates, weight
23 distribution, maximum weight allowed, gas -- fuel cell
24 size, fuel cell location, front and rear wing adjustments.
25 Those are the ones that jump out at me -- the obvious ones

1 right away. I mean, there -- I -- there probably is other
2 ones, but those are the ones I recall right at the moment.

3 Q. And so the way that you were doing this was that
4 you had your hex editor, and you were trying to isolate
5 where in executable file you could change values that would
6 change the way that those things would operate as you ran
7 the game; is that right?

8 A. That's correct.

9 Q. So that must have been an extremely time consuming
10 process?

11 A. Yes, it was.

12 Q. And after you figured out which variable started
13 adjusting the wing issue that you just identified, you then
14 had to start playing with what values you put in there so
15 that you could make it work the way you wanted to work?

16 A. Yes.

17 Q. So it's just finding -- it's finding what values
18 you can put in that will make the car perform the way you
19 thought it should perform relative to more realistic open
20 wheel racing experience; is that fair?

21 A. Yes.

22 Q. Okay. And were you the only one in your
23 development team that was actually doing that trial and
24 error with respect to the -- these variables?

25 A. Yes.

1 Q. Now, while we were talking, the entry screen
2 stopped at a Sierra update screen that says that we need to
3 update through NASCAR 2003 Series 1.2.0.1 patch, and I'm
4 downloading that patch from Sierra.

5 Now, I think you also mentioned in your
6 answer, Mr. Robinson, that other than the car -- the
7 characteristics of the way the cars were to operate on the
8 track, there were also things that you addressed relating
9 to the -- interface I think was the term that you used.
10 What do you mean by that?

11 A. Some wording was changed in some of the garage
12 screens inside the game.

13 Q. And that was -- that wording resided in the
14 executable, or was that also --

15 A. Yes.

16 Q. Okay. Anything else that you can recall that you
17 changed in terms of categories of stuff?

18 A. We added realistic open wheel sounds because there
19 are sounds in the game that simulate the car idling on pit
20 row, taking off from pit row, changing gears, the sound
21 that a car makes when it changes gears, the sound that it
22 makes when it's running 10,000 RPMs down the backstretch at
23 Texas. That sound is unique from the sound that's sitting
24 there idling on pit row. We added in what we considered to
25 be more realistic sounds than using the existing sounds

1 that come in the silly game.

2 Q. Okay. And were those sounds that you added in --
3 those were part of the executable?

4 A. No.

5 Q. Okay. Those were another file that was contained
6 in the set that was a zip file?

7 A. It was in a sound folder.

8 Q. Okay. How did you -- well, when the data that was
9 those new sounds operates with NASCAR 2003, as it's
10 modified, it's still the NASCAR 2003 code that's processing
11 that data and making the sound on the system, isn't it?

12 A. Say that again.

13 Q. In other words, you -- let's -- assuming your
14 ovr2k5 has been loaded and the sound file is now resident
15 in the user's computer -- the sound file you just
16 describe -- and the user started it up and is now trying to
17 play the game, the software that processes the data that
18 has a sound file and makes the computer emit those sounds,
19 that's still part of the NASCAR 2003 code base, isn't it?

20 A. I have no idea.

21 Q. You don't know how that works?

22 A. Not particularly.

23 Q. Okay. Did you add any sound processing
24 functionality as part of this ovr2k5?

25 A. Describe what you mean by "sound processing."

1 Q. In other words, some application that actually --
2 actually sends the sound signals to the speaker system
3 that's attached to the computer?

4 A. That doesn't make any sense --

5 Q. Okay.

6 A. -- so I can't answer that.

7 Q. Well, when you say you added all these sounds and
8 they were in a file --

9 A. They're in individual files called WAV files.

10 Q. Right. And the WAV files get processed by some
11 functionality in the software, correct?

12 A. Yes.

13 Q. And then that causes the computer to emit the
14 sound that the WAV file is designed to generate, correct?

15 A. Yes.

16 Q. Okay. Now, is there a functionality that you know
17 of in NASCAR 2003 that interacts with these WAV files that
18 causes, for example, the idling sound to emit when the car
19 on the screen is sitting idling in pit row?

20 A. Some combination of events take place that causes
21 a pointer to point to a specific file.

22 Q. Right. Did you alter those combination of events
23 or codes, to your knowledge?

24 A. Not that I recall.

25 Q. Okay. So that would have been --

1 A. Because I -- yeah, not that I recall.

2 Q. Okay. So that would have been something that was
3 in the NASCAR 2003 product -- the retail product that was
4 then incorporated in the modification, correct?

5 A. There was nothing incorporated except the sound
6 file. Nothing was incorporated, as I recall, in the
7 modified executable that changed the way sound was
8 handled --

9 Q. Okay.

10 A. -- as you've just described.

11 Q. Okay. That -- I think you've answered my
12 question.

13 Now, in addition to the sounds that you added
14 in, were there -- what other files were being added in for
15 this ovr2k5?

16 A. There's some default cars that got loaded into the
17 series folder, as I recall. I don't know how many,
18 probably 20 or so.

19 Q. Okay.

20 A. There's probably some other random artwork
21 associated with the -- that's mod specific like that one
22 splash screen that you had up there earlier, that's a piece
23 of artwork --

24 Q. Uh-huh.

25 A. -- so that gets installed. It doesn't have

1 Q. So --

2 A. When you put all those together and you drive a
3 car, it sounds more realistic than listening to them one by
4 one.

5 Q. Okay. I'm just trying to understand how much of
6 this was original content from NASCAR 2003 and how much of
7 it was stuff that your group added.

8 A. It's hard to say because the naming convention of
9 the files is the same as what's used in NASCAR 2003.

10 Q. I see.

11 A. Because as we discussed before, in the executable,
12 it points to some file at any given point in time.

13 Q. Right.

14 A. So in order to use it correctly, you have to name
15 it those names.

16 Q. Right.

17 A. Now, it would seem that there's some stuff missing
18 there, but I'm not 100 percent sure --

19 Q. Okay.

20 A. -- as I just included what was provided into the
21 game.

22 Q. Okay.

23 A. Like there's some spotter sounds that don't look
24 like they're there.

25 Q. So when your -- when the ovr2k5 file loads, does

1 and you went back in and did some more changes to the
2 values that you can recall?

3 A. At some point, we had what we considered a
4 baseline and then as we got closer to coming up with this
5 version, we had what we considered release candidates.
6 We'd test a little bit, see if we liked it, check in
7 different variables, temperature, heat, tire, wear, those
8 types of things, and if necessary, make a change.
9 Sometimes we didn't make a change. If we needed to make a
10 change, we made a change.

11 Q. And when you say "we made a change," were these
12 changes in variables things you were doing?

13 A. Yes.

14 Q. It wasn't Joe or Rob who were making those
15 changes, or was it?

16 A. No.

17 Q. Do you recall how many times you did make those
18 changes because you -- in the test run you found something
19 that was unsatisfactory?

20 A. It was only one or two.

21 Q. And that was all happening in like November,
22 December of 2004; is that right?

23 A. Yes.

24 Q. We were looking at the Open Wheel Racing 2005
25 Season. I think one of the questions I asked you a ways

1 back that actually got us to look into this file was
2 whether or not you can recall whether the no CD patch was
3 included in this. Are you able to tell?

4 A. I don't see it.

5 Q. It would have been its own file?

6 A. Yes.

7 Q. Okay. Did you have any discussions with
8 anybody -- or do you think -- about including or not
9 including a no CD patch to this product?

10 A. I think we all assumed that at some point we'd
11 probably create one, but we never got that far.

12 Q. Okay. Now, I'm going to ask a series of questions
13 that ask you to compare the way the ovr2k5 program was
14 supposed to operate, to your understanding of how the
15 NASCAR 2003 program does operate. So as far as the -- I'll
16 call it a plot, what the user is supposed to do, they're
17 both for auto racing simulation, correct?

18 A. Yes.

19 Q. Okay. And as far as the theme, how people are
20 using auto racing, one is for NASCAR cars and the other is
21 for open wheel cars?

22 A. In that context, yes.

23 Q. Okay. Is there some other theme of --

24 A. You could be racing a truck. You could be racing
25 a Busch car. You could be racing a TPTCC car. You could

EXHIBIT 2

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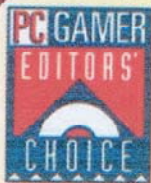
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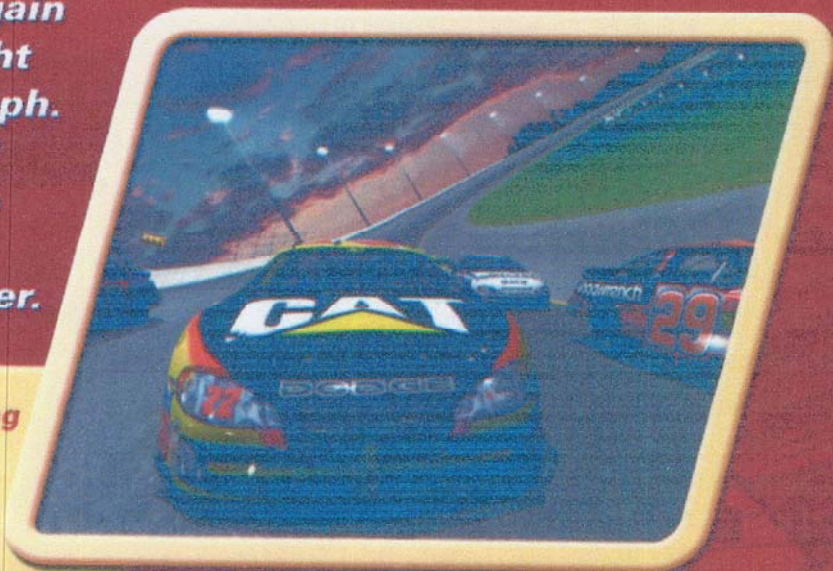
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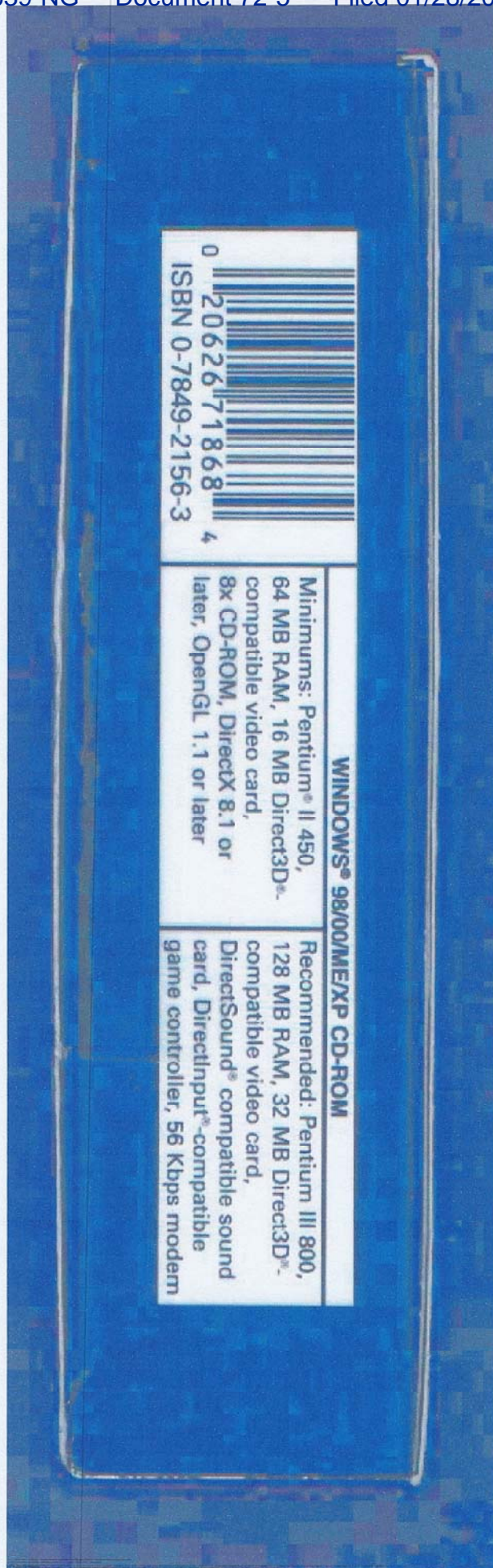
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card, DirectInput®-compatible
game controller, 56 Kbps modem



LET



RIGHT SIDE

EXHIBIT 3

From: [Chris Weidner](#)
To: chris.weidner@first-racing.net;
CC:
Subject: FIRST Beta Invite
Date: Tuesday, December 21, 2004 10:16:13 PM
Attachments:

Dear Racing Enthusiast,

Hello from FIRST-Racing.Net and thank you for expressing interest in becoming a beta tester. We are offering you an opportunity to participate in early beta testing of some of the structures and concepts FIRST-Racing.Net intends to eventually offer to customers. You will be able to play a potentially significant role in helping to shape what will become the finest learning tool and competitive environment serious racing enthusiasts have ever been seen.

To become a beta tester, you must carefully read the Non-Disclosure Agreement we have attached here, please complete the following steps...

1. Download the Non-Discloser Agreement here

www.first-racing.net/files/NDA.doc

2. Print, read carefully, and fill out the Non-Disclosure Agreement.
3. Send NDA immediately to:

FIRST-Racing.net
Attn: Steve Myers
175 Middlesex Turnpike
Suite 2B
Bedford MA 01730

** NDA must be received by January 5th! There will be no exceptions to this deadline! **

Beta testing is not fun and games. It's a commitment to being a part of team that is developing a racing simulation of the highest order. If you are given an opportunity to participate, you will be joining the FIRST

Beta League and participate in active competition in testing new products. These products presently are rudimentary and based on NASCAR Racing 2003.

You must own a copy of NASCAR Racing 2003 product from Papyrus Racing

Games. At this very early stage of testing we are using very low horsepower cars for testing the beginning levels of FIRST. Therefore your experience level can be from novice to expert - it does not matter. What matters is participation and feedback.

Races will be held Sundays, Mondays, Wednesdays and Thursdays at 3pm ET, 6pm ET, 9pm ET and midnight ET. Therefore testers should reside in or near the four American time zones or European time zones at this point. We ask that you try to race at least twice a week. Races generally last less than one hour. We also ask that you comment on what you like and don't like.

Please understand that many, many features are under development and are not available at this time. What you will be testing is not yet representative of what is under development. We are primarily testing concepts and structures.

If you fill out the NDA is properly you should expect to hear from us in the very near future because the next beta season begins January 9th. **Please keep this invitation to you confidential.**

Thank you.

Nim Cross

Commissioner – FIRST-Racing.net

EXHIBIT 4

From: [Shannon Whitmore](#)
To: swdiecast@ow-racing.com;
CC:
Subject: FW: FIRST Beta Files
Date: Wednesday, December 29, 2004 2:05:56 PM
Attachments:

From: Nim Cross [mailto:nim@virtualracingworld.com]
Sent: Wednesday, December 29, 2004 1:57 PM
To: chris.weidner@first-racing.net; nim@virtualracingworld.com
Cc: shannon.whitmore@sbcglobal.net
Subject: FIRST Beta Files

Dear First Beta-Tester,

This email contains the links and files you will need to run in the upcoming beta season. These files are unique to each individual. This means that if your files get out to the public we will know who has leaked them. The file is in your name and there is also a code inside the code that will tell us everything we need to know to trace any leaked files back to you. How they get out is not our concern. If you leak them or they are stolen from you, in any way, you will be held accountable and we will take every legal recourse available to us.

We need you to also understand this. We are testing ideas and formulas. We are not testing this physics engine or car modeling. This mod you are getting is NOT our future product. This mod was created for us to have some fun that relates somewhat to what our future goals are. We are using N2003 to do this test but understand our future product will be a whole new sim. Not the mod you will be driving now.

Your password and personal executable is located here. **(This is not an install file. Just unzip this file to your NASCAR2003 root folder.)**
(The password is the first set of numbers. The link to your file is after the password)

Mr9cFsZRn3kIPXA2 http://www.first-racing.net/downloads/g9kQ2c/FirstBeta_3dlqjn2v_TimRobinson.zip

You will also need these files.

http://www.first-racing.net/downloads/series/FirstBeta_FPA.zip

http://www.first-racing.net/downloads/series/FirstBeta_FPB.zip

-

-
Instruction: Unzip the above files to your NASCAR 2003 folder. They will unzip to proper folders if you do so. Make a shortcut to the new exe and use this for all beta testing. Your old exe will not be affected and you may continue to use that for normal racing outside the beta.

You will see two additional mods with the new exe. The FPA mod is 320 hp cars and the FPB mod is 160hp cars. We will be using the 160hp cars are what we will be using for this beta season.

*NOTE We will run practice races the week of Jan 2, 2005. We will try to get practice servers up ASAP. If we do the information will be posted in the NEWS forum.

Thank you,
Nim

EXHIBIT 5

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[Confluence - No CD patch](#)

No CD patches for GTP / **NR2003**. The requirement to have a CD in the drive when playing **NR2003** or GTP is not very convenient. Furthermore, a lot of people ...

[https://opensource.luminis.net/confluence/display/VROC/No+CD+patch](#) - 15k

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[NascarSeason2003 NascarSeason2003](#)

This is a short description, how to install and run **NR2003** with Wine. ... Next thing get the **no-cd**-crack also for the new version. ...

www.zefix.tv/linux_wine_racing_simulations/NascarSeason2003 - 12k

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(New in this rsClient allows running **NR2003** without having to have the CD in the Drive. The **N2003 No CD Patch v 1.2.0.1** located at the link below is needed ...

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EXHIBIT 6

<http://www.copyright.gov/fedreg/2000/65fr64555.html>

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IV. Conclusion

Pursuant to the mandate of 17 U.S.C. 1201 (b) and having considered the evidence in the record, the contentions of the parties, and the statutory objectives, the Register of Copyrights recommends that the Librarian of Congress publish two classes of copyrighted works where the Register has found that noninfringing uses by users of such copyrighted works are, or are likely to be, adversely affected, and the prohibition found in 17 U.S.C. 1201 (a) should not apply to such users with respect to such class of work for the ensuing 3-year period. The classes of work so identified are:

1. Compilations consisting of lists of websites blocked by filtering software applications;
and
2. Literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsolescence.

The Register notes that any exemption of classes of copyrighted works published by the Librarian will be effective only until October 28, 2003. Before that period expires, the Register will initiate a new rulemaking to consider de novo what classes of copyrighted works, if any, should be exempt from Sec. 1201(a)(1)(A) commencing October 28, 2003.

Marybeth Peters, Register of Copyrights.

Determination of the Librarian of Congress

Having duly considered and accepted the recommendation of the Register of Copyrights concerning what classes of copyrighted works should be exempt from 17 U.S.C. 1201(a)(1)(A), the Librarian of Congress is exercising his authority under 17 U.S.C. 1201(a)(1)(C) and (D) and is publishing as a new rule the two classes of copyrighted works that shall be subject to the exemption found in 17 U.S.C. 1201(a)(1)(B) from the prohibition against circumvention of technological measures that effectively control access to copyrighted works set forth in 17 U.S.C. 1201(a)(1)(A) for the period from October 28, 2000 to October 28, 2003. The classes are:

1. Compilations consisting of lists of websites blocked by filtering software applications;
and

2. Literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsolescence.

List of Subjects in 37 CFR Part 201

Copyright, Exemptions to prohibition against circumvention.

For the reasons set forth in the preamble, the Library amends 37 CFR part 201 as follows:

PART 201--GENERAL PROVISIONS

1. The authority citation for part 201 continues to read as follows: Authority: 17 U.S.C. 702.

2. A new Sec. 201.40 is added to read as follows:

Sec. 201.40 Exemption to prohibition against circumvention.

(a) General. This section prescribes the classes of copyrighted works for which the Librarian of Congress has determined, pursuant to 17 U.S.C. 1201(a)(1)(C) and (D), that noninfringing uses by persons who are users of such works are, or are likely to be, adversely affected. The prohibition against circumvention of technological measures that control access to copyrighted works set forth in 17 U.S.C. 1201(a)(1)(A) shall not apply to such users of the prescribed classes of copyrighted works.

(b) Classes of copyrighted works. Pursuant to the authority set forth in 17 U.S.C. 1201(a)(1)(C) and (D), and upon the recommendation of the Register of copyrights, the Librarian has determined that two classes of copyrighted works shall be subject to the exemption found in 17 U.S.C. 1201(a)(1)(B) from the prohibition against circumvention of technological measures that effectively control access to copyrighted works set forth in 17 U.S.C. 1201(a)(1)(A) for the period from October 28, 2000 to October 28, 2003. The exempted classes of works are:

(1) Compilations consisting of lists of websites blocked by filtering software applications; and

(2) Literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsolescence.

Dated: October 23, 2000.

James H. Billington,

The Librarian of Congress

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